129-52

AGREED RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1888.

No. 1154.

WILLIAM BALDWIN, PLAINTIFF IN ERROR,

vs.

THE STATE OF KANSAS.

IN ERROR TO THE SUPREME COURT OF THE STATE OF KANSAS.

RECORD FILED OCTOBER 1, 1888.

AGREED RECORD FILED NOVEMBER 21, 1888.

accession 24870

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1888.

No. 1154.

WILLIAM BALDWIN, PLAINTIFF IN ERROR,

vs.

THE STATE OF KANSAS.

IN ERROR TO THE SUPREME COURT OF THE STATE OF KANSAS.

INDEX.

	Original.	Print.
Stipulation as to record	1	1
Information	1	1
Form of oath	3	3
Statement of facts	3	3
Question on motion for new trial	6	4
Extracts from opinion	6	5
" " motion for rehearing	7	5
Order denying motion for rehearing	8	5

JUDD & DETWEILER, PRINTERS, WASHINGTON, DECEMBER 4, 1888.

1 *Stipulation.*

In the Supreme Court of the United States.

THE STATE OF KANSAS *vs.* WILLIAM J. BALDWIN.

For the purpose of condensing the record and simplifying the questions to be presented to the court it is agreed that the record contains the following information upon which the defendant, William J. Baldwin, was convicted of murder in the first degree in the district court of Atchison county, State of Kansas, to wit:

Information.

UNITED STATES OF AMERICA,
The State of Kansas, County of Atchison:

In the District Court of the Second Judicial District of the State of Kansas, Sitting in and for Atchison County, at its November Term, 1885.

THE STATE OF KANSAS, Plaintiff,
vs.
WILLIAM BALDWIN, Defendant.

First count.

W. D. Gilbert, county attorney in and for the county of Atchison, in the State of Kansas, in the name of and by the authority of the State of Kansas, comes here into the said district court of the said Atchison county on this second day of November, in the year of our Lord one thousand eight hundred and eighty-five, and gives the said court to understand and be informed that the defendant, William Baldwin, late of said county of Atchison, State of Kansas, on or about the 8th day of July, A. D. 1885, in the said county of Atchison, State of Kansas, then and there being, did then and there unlawfully, wilfully, deliberately, premeditatedly, purposely, feloniously, and with malice aforethought assault, kill, and murder one Mary Baldwin, a human being, then and there being, by then and there unlawfully, wilfully, deliberately, premeditatedly, purposely, feloniously, and with malice aforethought administering to the said Mary Baldwin an anesthetic, to wit, chloroform, and other like poisons, said anesthetic then and there so administered as aforesaid by said defendant, William Baldwin, to said Mary Bald-
2 win being then and there a deadly poison, with the felonious intent then and there purposely, unlawfully, wilfully, premeditatedly, and with malice aforethought her, the said Mary Baldwin, to kill and murder, contrary to the form of statute in such case made and provided and against the peace and dignity of the State of Kansas.

Second count.

W. D. Gilbert, county attorney in and for the county of Atchison, in the State of Kansas, in the name and by the authority of the State of Kansas, comes here into the said district court of said Atchison county on this second day of November, in the year of our Lord one thousand eight hundred and eighty-five, and further gives said court to understand and be informed that the said defendant, William Baldwin, late of said county of Atchison, State of Kansas, on or about the eighth day of July, A. D. 1885, in the said county of Atchison, State of Kansas, then and there being, did then and there unlawfully, wilfully, deliberately, premeditatedly, purposely, feloniously, and with malice aforethought assault, kill, and murder one Mary Baldwin, a human being, then and there being, by then and there unlawfully, wilfully, deliberately, premeditatedly, purposely, feloniously, forcibly, and with malice aforethought pressing a pillow on, over, and against the mouth, nose, and face of her, the said Mary Baldwin, thereby preventing respiration and producing death of her, the said Mary Baldwin, by reason whereof the said Mary Baldwin then and there died, with the felonious intent then and there purposely, unlawfully, wilfully, deliberately, premeditatedly, and with malice aforethought her, the said Mary Baldwin, to kill and murder, contrary to the statute in such case made and provided and against the peace and dignity of the State of Kansas.

W. D. GILBERT,
Attorney of Atchison County, State of Kansas.

THE STATE OF KANSAS, *County of Atchison:*

W. D. Gilbert, of lawful age, being first duly sworn, upon oath deposes and says that he is county attorney of Atchison county, State of Kansas; that he has read and knows the contents of the foregoing information, and that the allegations, statements, and averments therein contained as subscribed by him are true, according to the best of his information and belief.

W. D. GILBERT,
County Attorney of Atchison County, State of Kansas.

Subscribed and sworn to before me this 2d day of November, A. D. 1885.

JOHN MOORE,
Clerk of the District Court.

That the record contains the following statement of the form of oath administered to the jury, to wit:

3 STATE OF KANSAS, Plaintiff,
vs.
WILLIAM J. BALDWIN, Defendant.

* * * * * * *

The issue being joined upon the plea of not guilty, came a jury, to wit:

* * * * * * *

twelve good and lawful men, having the qualifications of jurors, who were elected, tried, and sworn well and truly to try the issues joined herein. * * *

That there was no other form of oath administered to the jury as disclosed by the record.

That the bill of exceptions signed by the judge before whom said case was tried contains the following form of oath administered to the jury, to wit:

Bill of Exceptions No. 1.

In the District Court, Atchison County, State of Kansas.

THE STATE OF KANSAS, Plaintiff,
vs.
WILLIAM J. BALDWIN, Defendant.

"Be it remembered on this 14th day of November, A. D. 1885, at the November term, A. D. 1885, of said court, a jury was empanelled and sworn to well and truly try the issues joined herein." * * *

That all of the facts and circumstances disclosed by the record filed herein (which contains all of the evidence) tending in any manner to connect William J. Baldwin with the murder of his sister, Mary Baldwin, are the following, viz:

First. William J. Baldwin was the brother of Mary Baldwin. He was a married man and lived with his wife.

4 Second. The mother of Mary and William J. Baldwin was a widow, her husband having died about one year previous to the death of Mary Baldwin, leaving an estate worth about $40,000.00. There were but the two children. Under the laws of Kansas the mother inherited one-half and the children each one-quarter of the estate. The mother had been appointed administratrix of the estate. Each—Mary and William—had received $5,000 as a part of their distributive share. At the date of the death of Mary Baldwin the estate was unsettled.

Third. Upon the death of Mary (the sister) the mother inherited her property. The brother did not, under the law, inherit from the sister, of which fact the defendant had notice.

Fourth. There was no hostility between the brother and sister, and, so far as disclosed by the evidence in the record, the most friendly and cordial relations existed up to the death of Mary between the brother and sister.

The mother and daughter lived together in their home, about four blocks from the house where William J. Baldwin resided with his wife.

Fifth. On the night of the death of Mary Baldwin the mother was absent in the State of Iowa and Mary Baldwin was alone in her mother's house. The house was entered by means of a panel being cut out of a door. There were some marks about the panel of the door which had the appearance of having been made by a knife having a blade like the one in the pocket-knife carried by the
5 defendant, which was an ordinary pocket-knife, and it was not different from the pocket-knives usually carried. There was no peculiar mark on the blade of the knife and nothing in the marks on the panel of the door to indicate that they might not have been made by the blade of any ordinary pocket-knife.

Sixth. It is reasonably certain that Mary Baldwin died from the effects of chloroform, which had been purchased from a druggist in St. Joseph, Missouri, some time after January 12, 1885. Mary Baldwin died on the night of July 7, 1885, or the morning of July 8, 1885.

There is nothing in the evidence showing or tending to show that William J. Baldwin purchased the chloroform or even had it in his possession, or had any connection with it, except the testimony of a witness, Lewis H. Haynes, that defendant told him some time in April, May, or June, 1885, that he expected to go to St. Joseph, Missouri. There is no evidence showing or tending to show that defendant ever did go to St. Joseph, Missouri.

Seventh. There is no testimony showing or tending to show that any person saw defendant near his mother's house on the night of July 7th or the morning of July 8, 1885.

Eighth. The only claimed motive which the defendant could have had is that by killing his sister his mother would inherit his sister's share of the estate, and that thereafter he would kill his mother, and he would then become the owner by inheritance of all the estate left by his father, but there is no evidence in the
6 record to justify this inference except the relationship of the parties and the fact that he would inherit the entire estate in the event of death of both his sister and mother.

The record further shows that on the motion for a new trial in the district court the question was presented that the jury before whom the defendant was tried and convicted was not a legally constituted tribunal; that defendant had not been convicted by due process of law; that there was no evidence proving or tending to prove the guilt of the defendant; that the conviction was unlawful, erroneous, and contrary to the law of the land; all of which points were decided against the defendant; to all of which the defendant duly excepted.

That the same questions were duly presented to the supreme court of the State of Kansas and each thereof decided against the defendant.

In the opinion filed by the supreme court of Kansas, among other things it is said:

"It is highly important and necessary that the oath should be administered with due solemnity, in the presence of the prisoner and before the court, substantially in the manner prescribed by law. It may also be conceded that the record should show that the jury were sworn, and when the record does purport to set out in full the form of the oath upon which the verdict is based it must be in substantial compliance with the law; otherwise the conviction cannot stand." * * *

7 The defendant filed a motion for a rehearing in the supreme court in which the following, among other, reasons were assigned:

Because on the first assignment of error, as heretofore presented by appellant, this court, in the opinion filed herein, mistakes the record and erroneously states in said opinion that the form of oath administered to the jury does not appear in the bill of exceptions filed herein, and that it only appears in the journal entry made by the clerk of the court below.

Fifteenth. Because this court has erroneously sustained the conviction of the defendant against the law of the land and in face of the fact that the record does not disclose any evidence of his guilt.

By an amended motion, duly filed in the supreme court of the State of Kansas, the following grounds for a rehearing were set forth:

C. Because that in and by the fourteenth amendment to the Constitution of the United States of America it is provided that "No State shall deprive any person of life, liberty, or property without due process of law;" and by the decision of this court filed herein it is decided and held that although the jury by and before which the defendant was tried was not "sworn a true verdict to render according to the law and the evidence," as required by the statute of this State and by law, nevertheless the verdict of said jury must stand, as also the sentence of death thereon, because the defendant did not object to such illegally constituted jury and tribunal.

D. Because this court has decided that it is due process of law to deprive a person of his life and liberty by and through the instrumentality of an illegally constituted tribunal for the reason and only because the defendant did not interpose any objection

8 thereto, which decision is in conflict with and in contravention of said fourteenth amendment to the Constitution of the United States of America.

Thereafter the said the supreme court of the State of Kansas, on said motion for a rehearing, made and filed the following opinion and order, to wit:

THE STATE OF KANSAS, Appellee,

vs.

WILLIAM BALDWIN, Appellant.

Now comes on for decision the motion for a rehearing of this cause heretofore submitted herein, and thereupon, after consideration

of all the matters presented by said motion, it is ordered that the said motion be overruled and denied, and the court expressly finds that in empaneling and swearing the jury, as appears from the record presented, neither the fifth nor the fourteenth amendments to the Constitution of the United States were in any way violated or infringed, and that neither of said amendments were violated or infringed by any proceedings in the case.

To the overruling of which said motion the defendant duly excepted; and to the finding of the court that in empaneling and swearing the jury, as appears from the record presented, neither the fifth nor the fourteenth amendments to the Constitution of the United States were in any way violated or infringed, and that neither of said amendments were violated or infringed by any proceedings in the case, the defendant then and there duly excepted.

And the within and foregoing statement contains all of the matters of that portion of the record and transcript filed herein desired for the presentation of the questions involved and to be
9 considered by the Supreme Court of the United States.

S. B. BRADFORD,
Attorney General for the State of Kansas.
JOHN C. TOMLINSON,
Attorney for William J. Baldwin.

10 [Endorsed:] Supreme Court U. S. 1888, October term. No. 1154. William Baldwin, pl'ff in error, *vs.* The State of Kansas. Agreed record. Filed Nov. 21, 1888.

Office Supreme Court U. S.
FILED.
DEC 17 1898
JAMES. H. McKENNEY.
CLERK.

IN THE SUPREME COURT

—OF THE—

UNITED STATES.

WILLIAM J. BALDWIN,
Plaintiff in Error.

vs.

THE STATE OF KANSAS,
Defendant in Error.

BRIEF OF PLAINTIFF IN ERROR.

B. P. WAGGENER,
W. D. WEBB,
Attorneys for Plaintiff in Error.

IN THE SUPREME COURT

—OF THE—

UNITED STATES.

WILLIAM J. BALDWIN,
Plaintiff in Error.

vs.

THE STATE OF KANSAS,
Defendant in Error.

STATEMENT OF CASE.

At the November Term, A. D., 1885, of the District Court, within and for Atchison County, State of Kansas, an information was filed against William J. Baldwin, charging him with murder in the first degree, in causing the death of his sister, Mary Baldwin, by administering to her chloroform, from the effects of which she died. His trial was had at the same term of court, and he was convicted of murder in the first degree and

sentenced to death. A motion for a new trial, and in arrest of judgment was duly filed and overruled. An appeal was duly taken to the Supreme Court, and conviction and sentence was affirmed by that Court (see State vs. Baldwin, 36 Kas., 1), and he is now in the Kansas penitentiary under sentence of death. A writ of error was allowed by this court to the Supreme Court of Kansas. A duly certified transcript of all the proceedings in the Supreme and District Courts of the State of Kansas has been filed with the Clerk of this Court.

A stipulation has been signed by the Honorable, the Attorney General of the State of Kansas, and counsel for plaintiff in error, which sets forth so much of the record and transcript as is necessary for the presentation of the questions we suppose this court would be willing to consider.

The following questions are involved, viz:

FIRST. The statute of Kansas provides that, "*the jury shall be sworn to well and truly try the matters submitted to them in the case in hearing, and a true verdict give according the law and the evidence.*"

This oath was not administered in substance or in form, but as shown by the record, in the stipulation signed by the Attorney General, the only oath administered to the jury was "*well and truly try the issue joined herein.*" That by reason of the failure to administer the statutory oath in substance or in form, the jury was not a legally constituted tribunal, and in contemplation of law was not *a jury*. That a sentence of

death upon the verdict of such illegally constituted tribunal would deprive the plaintiff in error of his life without due process of law, and was a denial by the State of Kansas, through its judicial department of last resort, of the equal protection of the law.

SECOND. That the decision and judgment of the Supreme Court of the State of Kansas in affirming the sentence of death pronounced against the plaintiff in error when the evidence upon which such sentence was pronounced does not in any manner show, or tend to show, that plaintiff in error was guilty of the crime of murder, was an error so gross, and so unjustifiable as to amount, in law, to a denial by the judicial department of last resort of the State of Kansas of that equal protection of the law guaranteed by the fourteenth amendment to the Constitution of the United States.

THIRD. That in and by the said decision and judgment of said Supreme Court of Kansas, it has departed from the provision of the statute of Kansas, that "where there is a reasonable doubt of the defendant's guilt, he must be acquitted;" (Sec. 228, Crim. Code;) and from the repeated decisions of said Court, that "in order to convict on circumstantial evidence, not only the circumstances must all concur to show that the prisoner committed the crime, but they must all be inconsistent with any other rational conclusion;" (Horn vs. State, 1 Kan. 42;) and has announced a rule of law in conflict with the elementary principles of law, and with every reported decision on the subject, to the effect that if the evidence is "of such a nature that honest and intelligent

men might differ in opinion as to its sufficiency," then it is sufficient to justify a verdict of guilty.

The foregoing questions were raised in the District Court by motion for a new trial and in arrest of judgment, and by exceptions duly brought into the Bill of Exceptions; and again in the Supreme Court of the State of Kansas, where the case was submitted to said Court, and by a motion for a rehearing, in which court it was expressly decided and held that no provision of the fourteenth amendment to the Constitution of the United States was infringed or violated by any decision or proceeding in the trial of said case, as will appear from the stipulation filed herein.

ERRORS ASSIGNED.

FIRST. The jury before whom the plaintiff in error was tried and convicted, was not a legally constituted tribunal, or a tribunal recognized by any statutes of the State of Kansas, or of the United States, or by any law of the land.

SECOND. The plaintiff in error was not accorded such a trial as was his right under the constitution and statutes of Kansas, and the laws of the land.

THIRD. That in and by the constitution of the State of Kansas, and the statutes passed in pursuance thereof, the right of trial by jury is made inviolate, which said right was not accorded to plaintiff in error, but was denied him; and

he was tried, convicted and sentenced to suffer death without the forms of law being complied with, and without due process of law.

FOURTH. That the plaintiff in error was denied the equal protection of the constitution and laws of Kansas, and the law of the land, in this, that he was tried, convicted and condemned to suffer death for the murder of his sister, when in and by the evidence upon which such conviction was based, there does not appear any fact or circumstance, directly or indirectly, remotely or otherwise, showing or tending to show or to create a suspicion that he was guilty of or in any manner connected with the death of his sister, Mary Baldwin.

FIFTH. That with full knowledge of this fact, the Supreme Court of the State of Kansas, the judicial department of last resort in said State, did injuriously discriminate against the plaintiff in error, in order to affirm such judgment of conviction and sentence, by ignoring the mandatory provision of the statutes of Kansas, the constitution of said State, and the repeated decisions of said Court upon the same questions, and by announcing a rule of law hitherto unknown in civilized countries, to the effect that in cases of circumstantial evidence, "if the evidence was of such a nature that honest and intelligent men might differ in opinion as to its sufficiency, to justify a verdict of guilty," then it was sufficient.

SIXTH. That in and by said judgment and decision, the plaintiff in error is under sentence of death and about to be deprived of his life without due process of law, and by a denial to him by the

judicial department of last resort in the State of Kansas the equal protection of the law, and in violation of the fourteenth amendment to the the constitution of the State of Kansas.

ARGUMENT.

FIRST.

The Statutes of Kansas provide that, "*the jury shall be sworn to well and truly try the matters submitted to them in the case in hearing, and a true verdict give according to the law and the evidence.*"

The records (see stipulation signed by Attorney General,) and the *bill of exceptions* show that the jury, "*were sworn well and truly to try the issues joined;*" "that there was no other form of oath administered to the jury, as disclosed by the record."

It is contended that the oath administered to the jury was, in effect, *no oath;* and the case is in the same condition as if the record showed *affirmatively* that the case was tried before a jury that had not been sworn.

The Supreme Court of Nevada (11 Nevada, page 60,) say that "a jury for the trial of a cause was a body of twelve men * * * * duly empaneled under the direction of the Court, *sworn to render a true verdict according to the law and the evidence given to them;*" etc.

In Hummell vs. The State, 86 Ind., 431, the Court say: "A jury trial cannot begin until the jury is *sworn*." "A jury is a body of men summoned *and sworn* to decide upon the facts at issue at the trial."

In the case of Dixon vs. The State, 4 G. Greene (Iowa), 381, the Court say: "A jury * * were sworn 'the truth to speak,' without being sworn 'to try the issue joined,' as required by the code; held that the jury were not legally sworn."

In the case of Warren vs. The State, 1 G. Greene, Iowa, 106, the Court say: "* * * The transcript of the record states that the jury were sworn the truth to speak on the issue joined, etc. It is hardly necessary to state that such an oath is not recognized by statute."

In the case of Harriman vs. The State, 2 G. Greene, (Iowa,) 285, the Court say: "It is alleged that the oath of the jury, as shown by the record, was illegal. The record sets forth the jury were "*sworn the truth to speak upon the issue joined between the parties.*" This appears to have been the form of the oath administered to the jury, as a qualification to try a prisoner upon an issue involving life or death. It is so deficient in substance, so barren of solemnity, of essential declaration and restrictions, which should be required as the most imposing moral and legal restraint from those who are entrusted with the life and destiny of a fellow being, that we can, under no rule of practice, affirm the judgment which resulted from their verdict. * * "

In the case of Maher vs. The State, 3 Minn., 447, the Court say: "The jurors were sworn to

try the issue joined, not well and truly to try and *true deliverance make.*" This is not sufficient. The statute has made the distinction and prescribed the form, *and it requires no argument to show that it is error to disregard it. The proposition has but to be stated to meet with general assent.*"

In the case of the State vs. Rullins, 22 N. H. (2 Foster) 533, the court say:

"*The oath administered was not in conformity with the statute, nor had it the sanction of usage. As well might the trial and conviction have been without the administration of an oath in any form. The respondent had a right of trial according to the rules of law fairly interpreted, and in the form and manner prescribed. The terms of the statute prescribing the form of the oath are not open to any doubt, and no other form is admissable in its stead. The form of oath is made by statute, of the substance of the trial, and can not be dispensed with. The terms of the jurors' oath are not to be regarded as a mere formality, but as operating as a substantial guide in their proceedings, and where, as in the present case, the legislature has prescribed the form of oath to be administered, it is not within the province of the court to allow another form to be substituted in its stead, either upon the ground that it is a mere formal proceeding, without the substituted oath is, in its terms, equivalent to the prescribed form, and is of equally binding and obligatory force upon the minds and consciences of the jurors.*

If the prescribed form may be properly dispensed with in one case, so it may with equal

propriety in every and all cases, and in that way the statutory provisions may be wholly defeated and disregarded. Such a departure from the prescribed mode in criminal trrials can not be tolerated consistently with the maintenance of the just rights of persons accused of crimes. Persons are properly convicted for crime only when their guilt has been determined in accordance with the prescribed forms of trial, and the established rules of law."

In the case of

Seer vs. The State, 2 Tex. Ct., App., 495, the court say: "The judgment entry recites that the jury were sworn *according to law* to try the issue joined between the parties. Held that this recital shows that a different oath than that prescribed by law was administered to the jury, and *no presumption to the contrary can be indulged.*" The court further say: "*Any other oath than the one prescribed is, in contemplation of law no oath.* The oath administered in this case is set out in the record, and *no presumption can be indulged to impeach its verity.*"

In the case of Holland vs. The State, 14 Tex., Ct., App., 182, the court say: "The law required the jury to be sworn, 'a true verdict to render, according to the law and the evidence.'" "This oath" says the court, "and none other will suffice; and the recital in the judgment that the '*jury were sworn to try the issue joined between the parties*' does not show that the jury were sworn according to law."

In the case of Johnson vs. The State, 47 Ala., 30-31, the court say: "The record in this case states that the jury were duly sworn to well and

truly try the issue joined between the State of Alabama and the defendant, Joe Johnson * * * * The oath stated leaves out an essential and substantial part of the oath required to be administered, to-wit: *and a true verdict render according to the evidence.*" * * * * This omission must necessarily render the verdict illegal, and insufficient to justify the fearful and terrible punishment to which the defendant is consigned by the sentence and judgment of the Court."

Bugg vs. The State, 47 Ala., 50.

In the case of Johnson vs. State, 47 Ala., 62, the record recited that "thereupon came a jury to-wit, E. B. R. and eleven others, good and lawful men, who being elected, tried and sworn well and truly to try the issue joined between the State of Alabama and the defendant, on their oath, etc., shows that the proper oath was not administered." The Court further say, "The oath upon which the verdict was based was evidently that set out in the record. The court can not presume any other, because this would contradict the record. * * * * The statutory oath imposes upon the jury a most solemn responsibility, 'well and truly' to try all issues submitted" to them, but they must also "a true verdict render according to the evidence."

See also

Lewis vs. The State, 51 Ala., 5.

Smith vs. The State, 53 Ala., 486.

Davis vs. The State, 54 Ala., 88.

Commander vs. The State, 60 Ala., 6.

Perkins vs. The State, 60 Ala., 7.

In the Case of Schamberger vs. The State, 68 Ala.. 543, decided in 1881, it was held that a recital in the judgment entry, in a criminal case, that the jury "was duly sworn," or was sworn "according to law," not setting out the oath, is sufficient; but a recital that the jurors were "sworn according to law, *to well and truly try the issues joined*, omitting the words "and a *true verdict rendered according to the evidence*, negatives the idea that the proper oath was administered."

Allen vs. The State, 71 Ala., 6.

Story vs. The State, 71 Ala., 330.

Johnson vs. The State, 74 Ala., 537.

In the opinion filed by Mr. Justice Johnson of the Supreme Court of Kansas (State vs. Baldwin, 36 Kas., 7.) he says: that "counsel for defendant have called our attention to the case of Johnson vs. The State, 47 Ala., 62. * * * The question was before the same court in a later case, and the ruling in Johnson vs. The State *supra* which had been followed in some other cases, was expressly overruled." (Mitchell vs. The State, 58 Ala., 417.) The learned Judge, although stating in the concluding part of the opinion (36 Kas. 26) "that every point made and authority cited, has been considered with that anxious attention which the consequences of conviction demand," overlooked the fact, that the ruling in Mitchell vs. State, 58 Ala., 417 was subsequently denied by the Supreme Court of Alabama, in the cases cited *supra*, beginning with 60 Ala., 6, down to the case of Cary vs. The State, 76 Ala., 78, decided at December term

1884, wherein the court say: "A recital in the judgment entry in a criminal case, that the '*jury were sworn well and truly to try the issues joined,*' without more, does not show a substantial compliance with the statute, *but negatives the idea that the proper oath was administered.*"

An examination of the motion for a re-hearing, in the record, will show that the attention of the Supreme Court of Kansas was especially called to the later decisions of the Supreme Court of Alabama, but without effect.

In the case of Sandford vs. The State, 6 Eng., (Ark) 328, the record stated that "comes a jury to-wit: Joseph Borden &c. * * who were duly empaneled, tried and sworn well and truly to try the issues joined in this case, and a true verdict to render *according to the evidence &c.*" The judgment of conviction was set aside, because the record did not show that the jury was sworn "a true verdict to render according *to the law* and evidence."

See also:

Patterson vs. The State. 2 Eng., (Ark.) 59.

Burrow vs. The State, 7 Eng. (Ark.) 67.

Bell vs. State, 5 Eng. (Ark.) 536.

In Bivans vs. State, 6 Eng., (11 Ark.) 455, on page 465, the court say "*that as the record exhibits the irregularity upon its face, this court cannot, where the record is thus to the contrary, presume that the jury was in fact properly sworn * * * * and consequently whenever the oath or the substance is set out in the record*

it must be intended that the oath thus set out was that that was actually administered. The prisoner in a capital case is certainly entitled by law to the protection and guaranty of the jurors' oath "and whenever it is omitted, wholly or in some material part, the law must intend that his rights were seriously jeopardized."

Harper vs. The State, 25 Ark., 83.

Lawson vs. The State, 25 Ark., 282.

Baker vs. The State, 39 Ark., 18.

Barborn vs. The State, 37 Ark. 61.

Roberts vs. Smith, Morris (Ia.) 551-3.

State vs. Angelo, 18 Nev. 429.

In the case of Martin vs. The State, 40 Tex. (Sup Ct.) 19, 26, the Court say that "no presumption can be indulged against the affirmative statement of what oath was administered, as appears here, and that when an improper oath thus appears to have been administered, it is error fatal to the proceedings."

Everett vs. The State, 4 Tex., Ct. Ap. 159.

Kennon vs. The State, 7 Tex. Ct. Ap. 326.

Dresch vs. The State, 14 Tex. Ct. Ap. 175.

Nels vs. The State, 2 Tex. (Sup Ct.) 280.

Baird vs. The State, 38 Tex. Sup Ct. 600.

Bawcom vs. The State, 41 Tex. Sup Ct. 189.

Edmundson vs. The State, 41 Tex. Supct. 501.

In the case of Minich vs. The People, 8 Colo., 450 and 451, the Court say that when "the record attempts to specify the duties which the jury in this case were sworn to perform, we are inclined to think there should, as to such duties, be no material ommission."

The Supreme Court of Kansas in opinion filed in this case say (36 Ks. 6) that "it is highly important and necessary that the oath should be administered with due solemnity, in the presence of the prisoner and before the court substantially in the manner prescribed by law. It may also be conceded that the record should show that the jury were sworn, and when the record does purport to set out in full the form of oath upon which the verdict is based, it must be in substantial compliance with law; otherwise the conviction cannot stand," but the court evades the question by mistating the record.

The stipulation filed, as well as the record, show that the jury were "*sworn well and truly to try the issue joined herein*," and the bill of exceptions signed by the trial judge states that the jury were "*sworn to well and truly try the issues joined herein.*"

There could not be a more emphatic statement of what the jury were sworn to do. The record does not state, as one would infer from the opinion filed by the Supreme Court of Kansas, that the jury were "*duly sworn.*" We concede that would be sufficient. The record and the bill of exceptions, bring the case within the rule laid down by the great weight of authority in this country.

From these authorities we submit the proposition is fairly maintained that the jury before whom the plaintiff in error was tried was not a legally constituted tribunal—that it was not *a jury* in contemplation of law—that any verdict, by it rendered, was an absolute nullity, and did not form any proper basis for a sentence of death.

A If the foregoing proposition is correct, has this court jurisdiction to grant relief? We submit that it has. A sentence of death upon the verdict of such an illegally constituted tribunal, would not be due process of law. If "due process of law," is "law in its regular course of administration through courts of justice," then plaintiff in error is to lose his life without due process of law, for it will certainly not be contended that it is law in its regular course of administration, to submit to twelve men, an issue which involved human life, without any admonition, that that life could not be taken except upon evidence and in accordance with the law of the land. No such admonition was given to the jury in this case. The meaningless words of the oath administered to the jury—"to well and truly try the issue joined," were not in conformity with the statute; with the common law, nor had they the sanction of usage. As well might the trial and conviction have been without the administration of an oath in any form. The statute of Kansas provides that "the jury *shall be* sworn to well and truly try the matters submitted to them in the case in hearing, *and a true verdict give according to law and the evidence.*" This requirement is mandatory. The form of oath is made by statute the substance of the trial, and cannot be dispensed with. Without such an oath there

could be no "trial by jury." Persons are properly convicted for a crime only when their guilt has been determined in accordance with the prescribed forms of trial and the established rules of law. The plaintiff in error was not convicted in accordance with the prescribed forms of trial, and at nearly every step in the proceeding the established rules of law were violated.

The Supreme Court of Kansas in case of State vs. Whisner, 35 Kas., 271, has defined the phrase "due process of law" to mean "law in its regular course of administration, according to prescribed forms and in accordance with the general rules for the protection of individual rights." Thereby adopting the language of this court in

Hurtado vs. The People, 110 U. S. 516.

In the case of Hurtado vs. People cited *supra*, Mr. Justice Mathews said that "law is something more than mere will exerted as an act of power. It must be not a special rule for a particular person or case, but, in the language of Mr. Webster, in his familiar definition, "the general law, a law which hears before it condemns, which proceeds upon inquiry, and renders judgment only after trial," so "that every citizen shall hold his life, liberty, property and immunities under the protection of the general rules which govern society. * * * Arbitrary power, enforcing its edicts to the injury of the persons and property of its subjects, is not law, whether manifested as the decree of a personal monarch or of an impersonal multitude.

* * * * * * *

The enforcement of these limitations by

judicial process is the device of self-governing communities to protect the rights of individuals and communities, as well against the power of numbers, *as against the violence of public agents* transcending the limits of lawful authority, *even when acting in the name and wielding the force of government.*" And the learned justice refers approvingly to the well considered case of Brown vs. Levee, Com., 50 Miss, 468, wherein it is said, speaking of the phrase "due process of law," that "it refers to certain fundamental rights which that system of jurisprudence, of which ours is a derivative, has always recognized. *If any of these are disregarded in the proceedings by which a person is condemned to the loss of life, liberty or property, then the deprivation has not been by "due process of law."*

The constitution of Kansas, Sec. 5, of the Bill of Rights provides "*the right of trial by jury shall be inviolate,*" and Sec. 10, of the Bill of Rights provides that in all prosecutions the accused shall have * * * * *a speedy public trial by an impartial jury* * * * * *"* and Sec. 197, of the Code of Crim, Pro., of the State of Kansas, "that the defendant and prosecuting attorney, with the assent of the Court, may submit the trial to the Court, except in cases of felonies; all other trials must be by a jury, to be selected, summoned and returned as prescribed by law." By the constitution and the statute, in case of felony, no other form of trial except a "trial by jury" is recognized.

In the face of this constitution and the settled law and usage of the State, can the Supreme Court, arbitrarily and without precedent, make

that "due process of law," which had not hitherto been known "as law in its regular course of administration through courts of justice?"

If the defendant had been tried before a single judge without a jury, convicted and sentenced to death, and the Supreme Court of Kansas had affirmed such conviction and sentence, would not such a proceeding be an attempt to deprive the defendant of his life without "due process of law?" Could not the defendant appeal to this tribunal to protect him from such a flagrant violation of the law of the land? Can the judicial department of final resort in a state make anything due process of law, which of its own will, it chooses to declare such? It is contended here that the defendant "has not had a fair trial, in a court of justice, *according to the modes of proceeding applicable to such a case.*"

In the case of *ex parte* Virginia 100 U. S. 346–347 Mr. Justice Strong, in speaking of the provisions of the fourteenth amendment said, "They have reference to actions of the political body denominated a State *by whatever instruments or in whatever modes that action may be taken.* A State acts by its legislative, its executive, or its *judicial authorities.* It can act in no other way. *The constitutional provision therefore, must mean that no agency of the State or of the officers or agents by whom its powers are exerted, shall deny to any person within its jurisdiction the equal protection of the law. Whoever by virtue of public position under a State government deprives another of property, life or liberty, without due process of law, or denies or takes away the equal protection of the laws, violates the constitutional inhibition; and*

as he acts in the name and for the State, and is clothed with the State powers, his act is that of the State. This must be so, or the constitutional prohibition has no meaning."

The supreme court of Kansas in the decision filed in this case expressly holds that the fourteenth amendment nor any of its provisions were violated in any of the proceedings *in* this case. It is forced to admit however that the oath administered to the jury must be in substantial conformity to the statute, or the conviction cannot stand. In effect it holds, that the administration of the proper oath is of the substance of the trial and cannot be dispensed with; but indulges in the presumption that another and different oath was administered than that set out in the record and bill of exceptions. Is such a presumption permissive or justified by anything contained in the record? We submit not.

THIRD.

If the jury in this case had been discharged without the administration of the statutory oath, to "well and truly try the matters submitted to them in hearing, and a true verdict give according to the law and the evidence," but instead thereof simply sworn "to well and truly try the issue joined" would the accused have been "once in jeopardy?" We submit that he would not.

Article V. of the amendment to the constitution of the United States, *inter alia* declares, "nor shall any person be subject for the same offense, to be twice put in jeopardy of life or limb," and Sec. 10 of the Bill of Rights of Kansas, *inter alia* declares that "no person shall * * * be twice put in jeopardy for the same offense."

In the case of Hilands vs. Commonwealth, 111 Pa., St., 1, the Supreme Court of Pennsylvania used the following language: "At what step in the prosecution is a person put in jeopardy, to which he shall not be subjected the second time for the same offense? Undoubtedly when the trial begins in which he is charged with a capital offense; that begins when the jury is charged with the prisoner. It is so charged as soon as twelve jurors are duly impaneled *and sworn. They are sworn well and truly to try and true deliverance make between the Commonwealth and the prisoner whom they have in charge.* The trial has then begun. The prisoner stands before them as his judges, with his life in their hands."

According to Supreme Court of Pennsylvania the trial has not begun until the jury have been duly and properly sworn. The administration of the proper oath is a condition precedent to the beginning of the trial.

Finley vs. State, 61 Ala., 201.

State vs. Hays, 2 Lea., (Ten.) 156.

Nolan vs. State, 55 Ga. 521.

Stone vs. State, 2 Scam. (Ill.) 326

Com vs. McFadden, 23 Pa., St. 12.

State vs. Redman, 17 Ind. 329.

Bedee vs. People, 73 Ill., 320.

Phillips vs. People, 88 Ill., 160.

People vs. McNealy, 17 Cal., 333.

In the case of McFadden vs. Com, 23 Pa., St., 12, 14, Black C. J., said: "We must therefore hold that the jury has the prisoner in charge when a full jury is empaneled and all of the jurors are sworn, * * * * * *until they have taken the oath, they are not jurors, and have no more control of his fate than any other equal number of citizens.* His trial cannot begin until the tribunal which is to try him is organized and qualified. If he is in jeopardy at any earlier period, he is in jeopardy from the hour when the first informal accusation was made, and at every step of the subsequent proceedings against him. To say this would be to assert what no ingenuity can reconcile with either authority or reason."

In the case of Teate vs. State, 53 Miss., 453, it is held that an accused is only placed in jeopardy when there is a valid indictment against him in a court of competent jurisdiction, and before *a legally constituted jury*, &c.

Wrinzorpflin vs. State, 7 Blackf, 186.

People vs. Webb, 38 Cal., 467.

People vs. Cage, 48 Cal., 323.

Hines vs. State, 24, O., St., 134.

In the case of Wright vs. State, 5 Ind., 290, an accused is in jeopardy only when "given in charge on a legal indictment to *a regular jury* &c."

In Alexander vs. Com, 105 Pa., St., 1, the Court say, that the "trial begins when the jury is charged with the defendant, and that is at the moment a full jury is empaneled *and sworn;* he is not in jeopardy before * * * * A man is not in peril from the verdict of a jury till the full number are qualified to harken unto evidence and make deliverance."

In Bishop on Criminal Law, Vol., 1, Sec., 1014-1015, it is said that "on the completing and *swearing of the panel*, the jeopardy of the accused begins * * * In other words, without a jury, set apart *and sworn* for the particular case, the individual defendant has not been conducted to his jeopardy. But when, according to the better opinion, the jury, being full, *is sworn*, and added to the other branch of the court, and all the preliminary things of record are for trial, the prisoner has reached the

jeopardy from the repetition of which our constitutional rule protects him."

By this author *the swearing* of the jury is a necessary prerequisite to placing the accused in jeopardy.

Link vs. State, 3 Heisk 252.

U. S. vs. Riley, 6 Blatch 204.

People vs. Cage, 48 Cal., 325, 326.

People vs. Webb, 38 Cal., 477, 478.

State vs. Redman, 17 Iowa 333.

U. S. vs. Jones, 31 Fed., Rep., 728.

Bryan vs. State, 34 Ga., 323.

FOURTH.

The agreed record herein sets forth clearly and briefly the facts disclosed by the transcript, *tending in any manner* to connect the plaintiff in error with the alleged homicide. They do not tend to cast upon him the slightest suspicion of guilt. An examination of the entire evidence upon which the conviction was had, will show that the facts in the agreed record are even stronger than justified by the evidence.

By the record here it appears that there has been a conviction and a sentence of death of a fellow citizen without a shadow of evidence upon which to base it.

In making this statement we do not believe that we are mistaken as to the facts or the inferences to be fairly and properly deduced therefrom; and for confirmation of this seemingly reckless assertion we respectfully ask the closest and most critical examination of the record, and if agreeable to this honorable court, an examination of the full transcript of the evidence.

The conviction in this case has no parallel in the history of the criminal jurisprudence of this country; and fortunately for mankind in general, but few parallels in the history of the criminal jurisprudence of any other country. It would perhaps be improper here to consider what combination of influences resulted so unfortunately to William Baldwin, but not inproper to urge, that from the record it conclusively appears that he was denied that equal protection of the law vouchsafed to the humblest citizen of our land. He has appealed to the highest judicial tribunal

of the State of Kansas for relief and it has been denied him. He must suffer death for a crime he never committed, unless this court shall grant relief.

It is not only a fundamental principal of the common law, but one of the cardinal features of the statutory law of Kansas that a person accused of crime "is presumed to be innocent until the contrary is proved." We know that this court will not ordinarily consider a question of fact; but we submit that this case should be made an exception to the rule, for the reason, that unlike every reported case, there is *no circumstance, no fact, no theory* disclosed by the record, upon which to base even a suspicion of guilt, or that plaintiff in error had the remotest connection with the tragedy, if tragedy it was, which resulted in the death of his sister.

Under such circumstances has the victim no remedy? Must he suffer death—innocent though he be—simply because the highest judicial tribunal of the State has said he was accorded a trial according to the forms of law? When it affirmatively appears from the record that such decision is without precedent to sustain it; that on the face of it the equal protection of the law is denied; that the trial was a mere mockery—before a jury that had not been sworn; that the sentence of death was upon the verdict of an illegally constituted tribunal, and without evidence to sustain it, is not the fourteenth amendment broad enough, and liberal enough in letter and in spirit to prevent such an unlawful sacrifice of a human life?

If there was any evidence fairly *tending* to

connect the accused with the crime, we would be loathe to urge upon this Court a consideration of this proposition; but so confident are we that our claim is fully sustained by the record, that, if this Court will examine into it, we feel assured that it will unhesitatingly say that the accused has not only been denied the equal protection of the law, but that he is under a sentence of death without due process of law. As was well said in case of Walbridge vs. State, 13 Neb., 236, "a jury can convict only on facts proved, and not on mere suspicion of guilt, however strong it may be." The law fixes the standard by which guilt is to be determined—that the proof shall exclude reasonable doubt of the prisoner's guilt. The credibility of the witnesses must necessarily be left to the jury, and they must determine from the testimony, under the instructions of the court, whether or not the accused is guilty. But if there is a failure to prove a material fact the jury cannot substitute their own judgment, or belief, or suspicion, for such fact, and find a verdict of guilty. If they do so the court has a plain duty to perform, to set the verdict aside. In nothing is the state more interested than in the protection of the innocent; and as courts deal only with tangible evidence, every person is innocent whom the proof fails to show is guilty. *Where there is a failure of proof upon a material point, the humblest citizen may confidently appeal to the courts to set aside a verdict that should not have been rendered. If this were not so, constitutional guarantees would amount to but little, while erroneous verdicts rendered under misapprehension, mistake, or from suspicion, would go unreversed. But such is not the law*," and in the case of Schuster vs.

State, 29 Ind., 395, the Court lays down the rule to be that "to sustain a conviction, the facts must be susceptible of explanation upon no reasonable hypothesis consistent with the innocence of the person charged, although the mysterious crime cannot be solved from the evidence except upon the supposition of the defendant's guilt, still conviction cannot follow. *The life or liberty of a person cannot be legally sacrificed* on the ground that only to regard him as guilty, an explanation is afforded of the perpetration of a proved offense. The circumstances surrounding the person charged must point beyond any other reasonable solution, to his guilt." Such is the law the world over, and has been in every state of this Union, until the Supreme Court of Kansas, in this case, overruled all precedent, and ignored the elementary principles of the law, by announcing the startling doctrine, that in a criminal case, where a human being was under sentence of death, the verdict would be sustained, if the evidence upon which it was based was of "*such a nature that honest and intelligent men might differ as to its sufficiency*" etc. Such is the rule in civil cases, but it seems to us to be a relic of barbarism, to announce such a rule in a case involving the life and liberty of a fellow citizen. This is a judicial determination, by the Supreme Court of Kansas, of the nature of the evidence, and in the face of the long line of decisions, that have been handed down by the ablest and purest of judges, since the organization of courts of justice, is as plain and outspoken denial "of the equal protection of the law," as it is possible to imagine; *a deprivation of life and liberty without due process of law*. The same court in an early case (Horn vs.

State, 1 Kas., 42) laid down the rule to be that "a few facts, or a multitude of facts proven, all consistent with the supposition of guilt, are not enough to warrant a verdict of guilty. In order to convict on circumstantial evidence, not only the circumstances must all concur to show that the prisoner committed the crime, but they must all be inconsistent with any other rational conclusion," and this rule was followed by the same court until the decision was made in this case.

State vs. Grebe, 17 Kas., 461.

State vs. Adams, 20 Kas., 328.

State vs. Witt, 34 Kas., 495.

State vs. Bridge, 29 Kans., 141.

But the decision of the supreme court of Kansas is subject to more criticisms than this one. A careful reading of it will disclose the fact, that the court gave no heed to many of its own prior decisions, and ignored or treated as trivial principles of law which had been settled and acted upon for ages past. The State was permitted, in its case in chief, to prove that the defendant had had trouble in jail with a fellow

prisoner three or four months after the alleged homicide, as evidence tending to show his guilt; and the supreme court of Kansas, being forced to admit that it was error, held that it was not prejudicial error, inasmuch as this incompetent evidence tended to show that defendant did not manifest as much grief over the death of his sister as he should have done.

The court further held that it was not error to show by a witness that he *as a detective* had had many years experience with criminals and in studying evidences of guilt in the expression of the human face, for the purpose of asking him the appearance of the defendant after the homicide; and that it was not error to ask a witness on cross examination, when the matter had not been referred to in his examination in chief, if he had not expressed the opinion before the Coroner's jury, that the defendant had the appearance of a guilty man; and that after such opinion-evidence had been admitted that it was not error to refuse to instruct the jury "that opinion of witnesses as to the guilt or innocence of the defendant is not evidence, and the jury will not consider any such evidence." * * * * although one witness, the detective, John M. Crowell, had testified that the defendant "looked like a guilty man *to my experience*," and "did not look to me, *in my experience*, as a man who was grieved."

Many of these matters do not appear in the opinion of the Court, but they are in the record, and the attention of the Supreme Court of Kansas, was called to them all, and were not referred to in the opinion: are treated as "trivial and unimportant." The *Albany Law Journal*,

one of the leading law magazines of this country, Vol. 35, pages 34, 35, in referring to the decision of the Supreme Court of Kansas in this case, among other things, said:

"We do not often deem it within our province to criticise the verdict of the juries and the decisions of courts in cases in other and distant States; but the case of the State of Kansas vs. William Baldwin, recently decided in the Supreme Court of that State, affirming a conviction of murder, seems so extraordinary as to justify a departure from our custom. * * * * The learned court say the evidence is "not entirely conclusive." We believe that nine lawyers of every ten in the United States would rather say that it does not even cast the shadow of a suspicion on the defendant. In addition to the legal presumption of innocence, every natural presumption is against his guilt; the tie of blood, the harmonious relations between him and the deceased, the complete absence of apparent motive;—no pique, no quarrel, no threats, no expectation of pecuniary gain—the utter failure to show his vicinity or his preparation. * * * If it were a verdict on the weight of evidence, the learned appellate Court might feel compelled to affirm; but standing, as we believe, as a case of complete failure of inculpatory evidence, we should suppose the appellate Court would do what the trial Court ought to have done; declare that there was no evidence whatever to warrant a conviction."

We cannot burden this court by calling special attention to the many errors shown by the record, but call attention to the few for the purpose of showing that the "equal protection of the law" has been denied the plaintiff in error,

and that he has been deprived of that "due process of law" by a proceeding from begining to end which cannot be dignified as a judicial proceeding.

We respectfully ask a reversal of the judgment, and that the plaintiff in error shall have a new trial which shall be conducted with some due regard to the law of the land.

B. P. WAGGENER,
W. D. WEBB,
Attorneys for Plaintiff in Error.

No. 1154

IN THE

Supreme Court of the United States.

THE STATE OF KANSAS, PLAINTIFF,

vs.

WILLIAM J. BALDWIN, DEFENDANT.

MOTION TO ADVANCE.

Now comes the plaintiff, by S. B. Bradford, the attorney general of said State, and prays this honorable Court that the above-named cause may be placed upon the docket of this Court for the October term, A. D. 1888, and that the same may be assigned for hearing during the month of December, A. D. 1888.

S. B. BRADFORD,
Attorney General of the State of Kansas.

IN THE SUPREME COURT OF THE UNITED STATES.

THE STATE OF KANSAS *vs.* WILLIAM J. BALDWIN.

Stipulation.

It is hereby stipulated and agreed that this action may be advanced and set down for hearing on any day during the month of December, 1888, to suit the convenience of the Court.

S. B. BRADFORD,
Attorney General of the State of Kansas.
JOHN C. TOMLINSON,
Attorney for William J. Baldwin.

OCTOBER 15, 1888.

No. 1154

IN THE

Supreme Court of the United States.

THE STATE OF KANSAS, PLAINTIFF,

vs.

WILLIAM J. BALDWIN, DEFENDANT.

MOTION TO ADVANCE.

Now comes the plaintiff, by S. B. Bradford, the attorney general of said State, and prays this honorable Court that the above-named cause may be placed upon the docket of this Court for the October term, A. D. 1888, and that the same may be assigned for hearing during the month of December, A. D. 1888.

S. B. BRADFORD,
Attorney General of the State of Kansas.

IN THE SUPREME COURT OF THE UNITED STATES.

THE STATE OF KANSAS *vs.* WILLIAM J. BALDWIN.

Stipulation.

It is hereby stipulated and agreed that this action may be advanced and set down for hearing on any day during the month of December, 1888, to suit the convenience of the Court.

S. B. BRADFORD,
Attorney General of the State of Kansas.
JOHN C. TOMLINSON,
Attorney for William J. Baldwin.

OCTOBER 15, 1888.

IN THE SUPREME COURT OF THE UNITED STATES.

THE STATE OF KANSAS, Plaintiff,

vs.

WILLIAM J. BALDWIN, Defendant.

Reasons.

Now comes the plaintiff, by S. B. Bradford, the attorney general of said State, and, for his reasons for advancing the above-entitled cause, says:

The defendant, William J. Baldwin, was convicted of the crime of murder in the first degree in the district court of Atchison county, Kansas, at the March, A. D. 1886, term of that court.

It was the judgment of the court that the defendant suffer the death penalty.

The defendant filed his motion for a new trial, which was overruled.

The defendant then appealed to the supreme court of the State of Kansas, where, after some delay, the judgment of the district court of Atchison county was affirmed.

The defendant was committed to the penitentiary of the State of Kansas in the month of April, A. D. 1886.

The defendant has been confined in the Kansas penitentiary for over two years.

He has perfected his appeal to this Court.

As the attorney general of the State of Kansas, I am informed that the defendant is without the necessary funds with which to prosecute his appeal if he should be required to pay the expense of his solicitors to the seat of government for the purpose of making this motion to advance his case upon the docket of this Court.

Having no interest in the prosecution of this case except that of a public officer, and believing the representations of

counsel to be true as to the ability of the defendant to pay such expenses as would be necessary to make this motion on his own part, and feeling that it is but just and proper that the defendant have a speedy trial of his appeal, as the attorney general and solicitor for the State of Kansas I am willing that the same shall be had. The defendant was charged with murder in the first degree for causing the death of his sister by the use of chloroform.

The evidence was largely circumstantial. The defendant maintains that the verdict of the jury is not sustained by the evidence; that the jury was not sworn to try the isssues joined and a true verdict render according to the law and the evidence; that there is an entire absence of any of the elements of guilt, but that the defendant was found guilty by the jury to satisfy the public clamor then raging in the county in which he was tried.

Believing that counsel for the defendant are sincere in pressing their assignment of error, and believing that their appeal will avail them nothing, I am still willing that they shall be heard.

S. B. Bradford,
Attorney General of the State of Kansas.

Office Supreme Court U. S.
FILED.
DEC 17 1888
JAMES. H. McKENNEY,
CLERK.

IN THE SUPREME COURT

OF THE UNITED STATES.

WILLIAM BALDWIN, *Plaintiff in Error*,
vs.
THE STATE OF KANSAS, *Defendant in Error*.

BRIEF OF DEFENDANT IN ERROR.

S. B. BRADFORD,
Attorney General of the State of Kansas.

KANSAS PUBLISHING HOUSE, TOPEKA.

IN THE SUPREME COURT
OF THE UNITED STATES.

WILLIAM BALDWIN, *Plaintiff in Error,*
vs.
THE STATE OF KANSAS, *Defendant in Error.*

BRIEF OF DEFENDANT IN ERROR.

STATEMENT.

On the 18th day of July, A. D. 1885, W. A. Ferguson, Coroner of the county of Atchison, issued his warrant to the sheriff or any constable of Atchison county therein, requiring the sheriff or constable to arrest and take before T. M. Pierce, a justice of the peace in and for Atchison county, the plaintiff in error, William Baldwin. The warrant was issued by authority of the statutes of Kansas, by the Coroner, W. A. Ferguson, on an inquest held by him as the coroner, in which the jurors found that Mary Baldwin came to her death by chloroform, feloniously administered by William Baldwin on the 7th day of July, 1885. Baldwin was arrested and taken before said justice of the peace for his preliminary examination. The examination was adjourned until the 22d day of July, 1885, at 9 o'clock. On the 22d day of July,

1885, the plaintiff appeared by the County Attorney of Atchison county, W. D. Gilbert, and the defendant, Wm. Baldwin, appeared personally, and by his attorneys, Everest & Waggener. The examination continued until the 23d day of July, 1885, at which time the defendant was held over for his appearance at the District Court of Atchison county, Kansas, in the sum of twenty-five thousand dollars.

On the 2d day of November, A. D. 1885, an information was filed by W. D. Gilbert, the then County Attorney of Atchison county, charging the defendant with the crime of murder in the first degree. The charge of the information is as follows, omitting caption:

"*First Count.* W. D. Gilbert, County Attorney in and for the county of Atchison, in the State of Kansas, in the name and by the authority of the State of Kansas, comes here into the said District Court of said Atchison county, on this 2d day of November, in the year of our Lord one thousand eight hundred and eighty-five, and gives the said court to understand and be informed: That the defendant, William Baldwin, late of said county of Atchison, State of Kansas, on or about the 8th day of July, A. D. 1885, in the said county of Atchison and State of Kansas, then and there being, did then and there unlawfully, willfully, deliberately, premeditatedly, purposely, feloniously and with malice aforethought, assault, kill and murder one Mary Baldwin, a human being then and there being, by then and there unlawfully, willfully, deliberately, premeditatedly, purposely, feloniously and with malice aforethought administering to the said Mary Baldwin an anesthetic, to wit, chloroform, and other like poisons, said anesthetic then and there so administered as aforesaid by said defendant, William Baldwin, to said Mary Baldwin being then and there a deadly poison, with the felonious intent, then and there purposely, unlawfully, willfully, premeditatedly and with malice aforethought, her, the said Mary Baldwin, to kill and murder, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State of Kansas.

"*Second Count.* W. D. Gilbert, County Attorney in and for the county of Atchison, in the State of Kansas, in the name and by the authority of the State of Kansas, comes here into the said District Court of said Atchison county on this 2d day of November, in the year of our Lord one thousand eight hundred and eighty-five, and further gives the said court to understand and be informed: That the said defendant, William Baldwin, late of said county of Atchison, State of Kansas, on or about the 8th day of July, A. D. 1885, in the said county of Atchison and State of Kansas, then and there being, did then and there unlaw-

fully, willfully, deliberately, premeditatedly, purposely, feloniously and with malice aforethought, assault, kill and murder one Mary Baldwin, a human being then and there being, by then and there unlawfully, willfully, deliberately, premeditatedly, purposely, feloniously, forcibly and with malice aforethought, pressing a pillow on, over and against the mouth, nose and face of her, the said Mary Baldwin, thereby preventing respiration and producing death of her, the said Mary Baldwin, by reason whereof the said Mary Baldwin then and there died, with the intent then and there purposely, unlawfully, willfully, deliberately, premeditatedly, and with malice aforethought, her, the said Mary Baldwin, to kill and murder; contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State of Kansas."

This information was sworn to in the manner provided by law, by the County Attorney, and the names of the witnesses at that time known to the County Attorney were indorsed upon the back of the information.

On the 7th day of November, A. D. 1885, the defendant, William Baldwin, was arraigned in open court on said information, and the same being read to him, he plead "Not guilty" thereto.

On the 11th day of November, 1885, among other things, the following journal entry was made:

THE STATE OF KANSAS, *Plaintiff*, *vs.* WILLIAM BALDWIN, *Defendant*.

"Now in this case the plaintiff appeared by W. D. Gilbert, County Attorney, and S. H. Glenn, its attorneys, and the defendant appeared in person and by Everest & Waggener, his attorneys, and the issue being joined upon the plea of not guilty, came a jury, to wit, C. A. Miller, Richard Ayers, Charles Hix, J. H. Artman, H. B. Dale, John Ernst, sr., Thomas Collier, George W. Bowser, John Burns, J. S. Allen, Robert Sparks, and Arthur Lacey, twelve good and lawful men having the qualifications of jurors, who, being duly elected, tried, and sworn well and truly to try the issue joined herein, pending the introduction of testimony, the court adjourned until to-morrow morning, November 12 A. D. 1885, at 9 o'clock."

On November 12th, 1885, the following entry was made:

THE STATE OF KANSAS, *Plaintiff*, *vs.* WILLIAM BALDWIN, *Defendant*.

"This case was again resumed before the same jury. The plaintiff appearing by W. D. Gilbert, County Attorney, its attorney, and the defendant appearing in person and with Everest & Waggener, his attorneys, and the jury having heard part of the evidence, pending the further

introduction of testimony, the court adjourned until to-morrow morning, November 13th, A. D. 1885, at 9 o'clock."

And in like manner the trial of the case of The State of Kansas *vs.* William Baldwin continued from day to day until the 17th day of November, 1885, at which time the following entry was made, omitting caption:

"This case was again resumed before the same jury, who, having heard all the evidence, the instructions of the court, and the arguments of counsel, retired under the charge of a sworn officer to consider of their verdict, and afterwards, to wit, on the 18th day of November, A. D 1885, returned into court, and through their foreman, presented to the court their said verdict, and which said verdict is in words and figures following, to wit:

THE STATE OF KANSAS, *Plaintiff*, *vs.* WILLIAM BALDWIN, *Defendant.*

"VERDICT.—We, the jury duly impaneled, charged and sworn in the above entitled action, do upon our oaths find the defendant William Baldwin guilty of murder in the first degree, as charged in the first count of the information.

JOHN ERNST, *Foreman.*"

On the 18th day of November, 1885, after the trial and verdict, a motion for a new trial was made by counsel for the defendant, William Baldwin; which motion for a new trial, omitting caption, is in the words and figures following, to wit:

"Now comes the said defendant, and moves the court to grant a new trial for the following reasons, to wit:

"First—Because the jury received evidence, papers, and documents not authorized by the court.

"Second—Because the court, on the trial of said case, admitted illegal testimony.

"Third—Newly-discovered evidence.

"Fourth—Because the jury were guilty of misconduct tending to prevent a fair and due consideration of the case.

"Fifth—Because the verdict of the jury was decided by means other than a fair expression of an opinion on the part of the jurors.

"Sixth—Because the court misdirected the jury in material matter of law.

"Seventh—Because the verdict is contrary to law.

"Eighth—Because the verdict is contrary to the evidence.

"Ninth—Because the court refused to give instructions to the jury as requested by the defendant.

"Tenth—Because the court neglected and refused to state to the jury all matters of law which were necessary for their information in giving their verdict.

"Eleventh — Because the verdict of the jury is not responsive to the information, or either count thereof.

"Twelfth — Affidavits and oral evidence will be used in support of this motion on the hearing of the same."

Afterwards, on the 19th day of November, A. D. 1885, an amended motion for a new trial was made, which, omitting caption, is in the words and figures following, to wit:

"AMENDED MOTION FOR A NEW TRIAL.

"Defendant moves the court to set aside the verdict and grant a new trial herein, for the following reasons, to wit:

"First — That the court erred in admitting the testimony of the witnesses, James and Worstall, and in permitting them to give an opinion over the objections of defendant.

"Second — That the court erred in admitting the letter of Mary Baldwin of date July 7th, 1885, over the objections of defendant.

"Third — That the court erred in receiving incompetent testimony over the objections of the defendant, by reason of which defendant was prevented from having a fair and impartial trial.

"Fourth — Because the court erred in refusing to receive competent and material testimony and evidence offered by the defendant.

"Fifth — Because the court permitted the court room inside the bar to be filled up and taken possession of by spectators, all prejudiced against the defendant.

"Sixth — Because the County Attorney and his associate, S. H. Glenn, were guilty of misconduct in their arguments to the jury, and in their discussion of facts not in evidence, to the great prejudice of the defendant, by which he was prevented from having a fair and impartial trial.

"Seventh — Because the court erred in its instructions to the jury, and especially in giving instructions 19, 20 and 23, which were duly excepted to by the defendant.

"Eighth — Because the court erred in refusing to give proper instructions asked by the defendant.

"Ninth — Because the jury received papers, documents and evidence not authorized by the court, and because the court admitted illegal testimony.

"Tenth — Newly-discovered evidence.

"Eleventh — Because the jury were guilty of misconduct tending to prevent a fair and due consideration of the case.

"Twelfth — Because the jury were influenced and controlled in the verdict rendered, by other means than by the testimony and the instructions of the court.

"Thirteenth — Because the jury were controlled and influenced by prejudice against the defendant.

"Fourteenth — Because the court misdirected the jury in material matters of law.

"Fifteenth — Because the verdict of the jury is contrary to evidence, and against the weight of evidence.

"Sixteenth — Because the verdict of the jury is contrary to law.

"Seventeenth — Because the jury in arriving at their verdict disregarded the instructions of the court.

"Eighteenth — For error of law occurring at the trial, and duly excepted to by the defendant at the time.

"Nineteenth — Surprise, which ordinary prudence could not have guarded against, in this, that the County Attorney, W. D. Gilbert, informed defendant's attorneys after the information had been filed, that he had no other testimony except such as would be cumulative of that offered on the preliminary examination. That notwithstanding such statement of said County Attorney, and notwithstanding he had knowledge that said witness, Binswanger, would be a witness at the time the information was filed, the said W. D. Gilbert intentionally and for the purpose of taking an undue advantage of the defendant, did conceal the fact that said party would be a witness, until after defendant had announced himself ready for trial, and when defendant had no time or opportunity to contradict or impeach the said witness.

"Affidavits, oral and record evidence will be used in support of this motion on the hearing of the same."

Afterwards, during the said term of court, the motion and amended motion for a new trial were argued before the court, and by the court considered and overruled.

On the 18th day of November, A. D. 1885, the said defendant filed his motion in arrest of judgment, which motion, omitting caption, is in the words and figures following, to-wit:

"Now comes the said defendant, and moves the court to arrest the judgment herein for the following reasons, to wit:

"*First* — That the facts stated in the information do not state a public offense.

"*Second* — Because the judgment of the jury is informal, irregular and void, and not such as the court can pass judgment upon.

"*Third* — Because the verdict is not responsive to the charge and allegations in the information, and the court cannot say under which count of the information the said defendant is convicted by the said verdict."

Which said motion in arrest of judgment was also overruled, and the defendant was sentenced by the court as provided by law.

Afterwards, on the 28th day of January, 1888, the defendant, William Baldwin, perfected his appeal to the Supreme Court of the State of Kansas.

At the July term, A. D. 1886, of the Supreme Court of the State of Kansas, the case came on to be heard, and after the presentation of briefs by both plaintiff and defendant, and argument of the case, the same was submitted to the court. All of the questions raised by the defendant in his appeal taken from the District Court to the Supreme Court of the State were decided against him, and the judgment of the District Court was affirmed by the Supreme Court, and the defendant was committed to the penitentiary of the State of Kansas, in accordance with the sentence of the Judge of the District Court pronounced upon him, and there remains to this day.

After the judgment of the Supreme Court of the State of Kansas affirming the judgment of the District Court, the defendant, by his attorneys, Everest & Waggener, filed a motion for a rehearing, in which the following, among other reasons, were assigned:

"Because on the first assignment of error, as heretofore presented by appellant, this court, in the opinion filed herein, mistakes the record and erroneously states in said opinion that the form of oath administered to the jury does not appear in the bill of exceptions filed herein, and that it only appears in the journal entry made by the clerk of the court below.

"Fifteenth.—Because this court has erroneously sustained the conviction of the defendant against the law of the land, and in face of the fact that the record does not disclose any evidence of his guilt."

By an amended motion, duly filed in the Supreme Court of the State of Kansas, the following grounds for a rehearing were set forth:

"*c.* Because in and by the fourteenth amendment to the Constitution of the United States of America, it is provided that 'No State shall deprive any person of life, liberty or property without due process of law;' and by the decision of this court, filed herein, it is decided and

held that although the jury by and before which the defendant was tried, was not 'sworn a true verdict to render according to the law and evidence,' as required by the statute of this State and by law, nevertheless the verdict of said jury must stand, as also the sentence of death thereon, because the defendant did not object to such illegally constituted jury and tribunal.

"*d.* Because this court had decided that it is due process of law to deprive a person of his life and liberty by and through the instrumentality of an illegally constituted tribunal, for the reason and only because the defendant did not interpose any objection thereto, which decision is in conflict with and in contravention of said fourteenth amendment to the Constitution of the United States of America."

Thereafter the said Supreme Court of the State of Kansas, on said motion for a rehearing, made and filed the following opinion and order, to wit:

"Now comes on for decision the motion for a rehearing of this cause heretofore submitted herein, and thereupon, after consideration of all the matters presented by said motion, it is ordered that the said motion be overruled and denied, and that the court expressly finds that in impaneling and swearing the jury, as appears from the record presented, neither the fifth nor the fourteenth amendments to the Constitution of the United States were in any way violated or infringed, and that neither of said amendments were violated or infringed by any proceedings in the case."

To this opinion of the Supreme Court overruling the application for a rehearing the plaintiff in error in this case excepted, as well as to the judgment of the court affirming the judgment of conviction of the trial court.

ARGUMENT.

In presenting this argument for the defendant in error I shall be as brief as the circumstances will permit. In my judgment there are but two questions to be considered as presented by the record in this case, and they are: Has this court jurisdiction? Has the defendant been deprived of life, liberty or property without due process of law? To determine the jurisdictional question, it is only necessary to examine the history of the case as presented in the record. The information was filed in the State court by the County Attor-

ney in the manner provided by law, and no motion to quash or other objection was ever made to it. The defendant was arraigned, and plead not guilty. A jury was selected and sworn in the presence of the accused and his counsel, and no objection was ever made to the form of the oath administered or the manner of administering it, at the time or during the trial of the cause, or even at the time of the making of the motion for a new trial before the trial court. After the trial and verdict of guilty a motion was made for a new trial, and all the errors at that time perceptible were complained of; but no complaint of unconstitutionality was made, presented, or passed upon by the trial court. The motion for a new trial was overruled by the trial court, and a motion for arrest of judgment was made in which, like the motion for a new trial, no reference is made to the form of oath administered to the jury, or the manner of administering it. That motion was also overruled. An appeal was taken to the Supreme Court of the State of Kansas, the court of last resort of the State, and all the errors presented to that court that were complained of in the motion for a new trial in the trial court; and in addition to the errors complained of to the trial court, it was suggested and argued before the Supreme Court, that the jury had not been sworn in the manner provided by law; and this argument we have reason to believe and infer was an afterthought of counsel for the defendant in error herein after an examination of the record, wherein he finds in the history of the case as given by the Clerk of the District Court, in the usual journal entries made by the clerk in such court, that the jury was sworn to try the issues joined.

After a careful examination by the Supreme Court of all the questions raised, they were all determined against the defendant, the plaintiff in error here, and the judgment of the trial court was affirmed. After the judgment of the

Supreme Court affirming the trial court, a motion for a rehearing was made by counsel for the plaintiff in error, and argued at great length, and for the first time in the history of this case the question of unconstitutionality is raised, or in other words, it is for the first time urged that the defendant has been deprived of life, liberty or property without due process of law.

The constitutionality or unconstitutionality of the Kansas law, under which the plaintiff in error was convicted, has never been questioned, or the construction of that law, as given by the trial court, was not attacked before the Supreme Court.

The object and purpose of a motion for a new trial in the trial court is to give to that court an opportunity to pass upon and modify, or correct at least, the errors committed by it, and when an appeal is taken to the court of last resort of the State the appellate court can only pass upon such questions as were presented to the trial court, and none other, and if that judgment of the court of last resort in the State, overruling or affirming the trial court, is appealed to the court of last resort of the nation, then the Supreme Court can only pass upon and review such questions as were passed upon by the trial court and reversed or affirmed by the court of last resort of the State. His Honor Chief Justice WAITE, in the case of *Spies v. Illinois*, 123 U. S. 181, in speaking of this question, makes use of the following language:

> "As the Supreme Court of the State was reviewing the decision of the trial court, it must appear that the claim was made in that court, because the Supreme Court was only authorized to review the judgment for errors committed there, and we can do no more."

And again, the Honorable Chief Justice makes use of the following language:

> "If the right was not set up or claimed in the proper court below, the judgment of the highest court of the State in the action is conclusive so far as the right of review here is concerned."

I therefore conclude that if the question of unconstitutionality or due process of law was not presented to the trial court, and that court given an opportunity to correct its own errors, that then the Supreme Court of the State of Kansas could not be called upon to correct errors uncomplained of, and this court under the *Spies* case could not go back and review errors uncomplained of before the trial court.

This leaves but one other question for us to consider, and that is, was the jury sworn? As I have hereinbefore stated, no objection was made in the trial court to the manner or form of oath administered to the jury. No opportunity was given the trial court to correct whatever errors it might have committed in that matter. As I have said before, the question as to whether the jury was properly sworn or not was an afterthought of counsel for the plaintiff in error. After the record had been prepared for the Supreme Court of the State, counsel in reading the record evidently discovered the language of the journal entry made by the clerk in giving a history of the progress of the trial, and as is usual in such cases, magnified its import and laid great stress upon it as an error committed by the trial court. The language of that journal entry should be taken as a whole in order to understand what was intended by the clerk; and to the end that this court may be informed, I give here the journal in full. It is as follows:

"Now in this case the plaintiff appeared by W. D. Gilbert, County Attorney, and S. H. Glenn, its attorneys, and the defendant appeared in person and by Everest & Waggener, his attorneys, and the issue being joined upon the plea of not guilty, came a jury, to wit: C. A. Miller, Richard Ayres, Charles Hix, J. H. Artman, H. B. Dale, John Ernst sr., Thomas Collier, George W. Bowser, John Burns, J. S. Allen, Robert Sparks, and Arthur Lacey, twelve good and lawful men having the qualifications of jurors, who, being duly elected, tried and sworn well and truly to try the issue joined herein, pending the introduction of testimony, the court adjourned until to-morrow morning, November 12, A. D. 1885, at 9 o'clock."

Counsel for plaintiff in error have quoted largely from opinions of the Supreme Court of Alabama to sustain the position taken by them, that if the jury was not properly sworn that it is tantamount to no oath having been administered to the jury. That if the jury was not sworn, or properly sworn, that then the imprisonment of the plaintiff in error is without due process of law. I will assent to the position of counsel for plaintiff in error, that if the jury is not properly sworn, that it is tantamount to the jury not having been sworn at all, and if the jury was not sworn, that then the imprisonment of the plaintiff in error is without due process of law.

The next proposition of disagreement between counsel for plaintiff in error and myself is, that in this case the record does not pretend to give the form of the oath administered by the clerk to the jury. The journal entry is simply a part of the history of the case. If the journal entry—the record as we call it—purported to give the form of the oath administered, and it should develop that that form fell far short of the oath required by law, then there would be no room for disagreement. It will be discovered by examination of all of the cases referred to by counsel for plaintiff in error, like in the case of *Dixon v. The State*, 4 Green (Ia.) 381, that the opinion of the court states distinctly that a jury was impaneled and sworn the truth to speak, and a verdict returned against the defendant. The court in that case say:

"In that case, the *record* showed that the oath administered to the jury was: 'the truth to speak upon the issue joined between the parties.'"

The case cited by counsel for plaintiff in error, found in 3 Minn. 447, is in keeping with the opinion to which I have last called the attention of the court; *i. e.*, the Supreme Court of Minnesota, in passing upon that question, say:

"The oath actually administered as appears by the return in this case, was that required in cases not capital, and not the oath prescribed in a capital case."

It would appear from the language of the Supreme Court of Minnesota in this case, that two forms of oaths were required in criminal cases. That in a capital case the oath required to be administered to the jury was that they should well and truly try the issues joined, and true deliverance make, and that the statute made a distinction and prescribed that form to be administered in capital cases, and that the record shows that that form had not been administered in that case, and therefore error had been committed.

Counsel for plaintiff in error rely with great confidence upon the case of *The State v. Rollins*, 2 Foster, (N. H.) 528. The particular language to which I desire to call the attention of the court is found on pages 532 and 533. The court in that case say:

"The only question proposed to be considered, is that arising upon the exception taken to the form of the oath administered to the jurors who returned the verdict in this case. The objection is, that the oath administered was not the oath required by the statute to be administered in criminal cases. The statute provides that the 'petit juror's oath in criminal cases' shall be in the following form, namely: 'You solemnly swear, that you will well and truly try, and true deliverance make, between the State of New Hampshire and the prisoner at the bar, whom you shall have in charge, according to law and the evidence given you. So help you God.'"

That court also say:

"The oath that was administered differs in its terms from that which is prescribed, and is inapplicable and inappropriate in a criminal trial."

It does not appear in that case, as in this, that a mere history or journal entry, like the one in the case at bar, was presented in the record, but I infer from the language of that opinion, that the oath itself had not been included in the record, or the exception to the form of the oath administered was taken at the time it was administered in the trial court.

Counsel for plaintiff in error cites approvingly the case of *Schamberger v. The State*, 68 Ala. 543. I, too, am inclined to cite approvingly of that case, and in my opinion it settles the controversy in this case. The court in that case make use of the following language:

"We have several times ruled, that when in the judgment entry it is recited that the jury was sworn 'according to law,' or 'duly sworn,' this is sufficient. This rule, if universally observed, would be very simple, and at the same time safe in practice. It would be well if the presiding judges, and especially the solicitors, would give attention to this. It would prevent many needless reversals. We have also frequently ruled, that if the judgment entry assumes to set out the oath administered, it must express all the essential elements the statute prescribes."

The court again say:

"The judgment entry in this case recites that the jurors were 'duly elected, tried, and sworn according to law.' This is amply sufficient, if the recital stopped with these words. But it goes further, and sets forth what they were sworn to do. It affirms that they were 'sworn according to law.'"

The conditions in the case at bar differ from the cases cited by plaintiff in this, that the Kansas statutes nowhere prescribe a form of oath to be administered. Section 208 of the criminal code, and section 274 of the civil code, provide that the jury shall be sworn to well and truly try the matters submitted to them in the case in hearing, and a true verdict give according to the law and evidence.

Associate Justice JOHNSTON, of the Kansas Supreme Court, in the opinion of the court in this case, makes use of the following language, which I think explains the theory upon which the Supreme Court of Kansas arrived at the conclusions they did:

"The contention of the defendant is, that the *record* undertakes to set out the oath actually administered to the jury, and that as it omitted the essential part of requiring that they should a true verdict give according to the law and the evidence, the judgment should be reversed."

Again the court say:

"It may also be conceded that the record should show that the jury were sworn, and when the record does purport to set out in full the form of the oath upon which the verdict is based, it must be in substantial compliance with law; otherwise the conviction cannot stand. The assumption by counsel that the oath as actually administered is set out in full in the record, it seems to us is unwarranted. What is stated in the record is but a recital by the clerk of the fact that the jury were sworn. The swearing was of course done orally in open court, and it is no part of the duty of the clerk to place on the record the exact formulary of words in which the oath was couched. He has performed his duty in that respect when he enters the fact that the jury were duly sworn, and when that is done, the presumption will be that the oath was correctly administered."

And again they say:

"It may be observed that in the form of the verdict returned, and which was prepared and presented to the jury by the trial judge, it was stated that the jury was duly impaneled and sworn."

And again they make use of the following language:

"A still more conclusive answer on this point is, that no objection was made to the form of the oath when it was administered, or at any other time prior to its presentation in this court. If there was any irregularity in this respect it should, and probably would have been objected to at the time it occurred. It is quite unlikely that there was any departure from the form of the oath so well understood, and which is in universal use in all of the courts of the State; but if the form of the oath was defective, the attention of the court should have been called to it at the time the oath was taken, so that it might have been corrected. A party cannot sit silently by and take the chances of acquittal, and subsequently, when convicted, make objections to an irregularity in the form of the oath. Not only must the objection be made when the irregularity is committed, but the form in which the oath was taken, as well as the objection, should be incorporated into the bill of exceptions, in order that this court may see whether or not it is sufficient."

I have herein already stated that no exception was taken to the form of the oath at the time it was administered, or at the time of making the motion for a new trial, or the motion for arrest of judgment in the trial court. Therefore, if no opportunity was presented the trial court to correct its errors in that respect, it was not a matter to be considered by the Supreme Court of the State, as no mention of it is made in

the bill of exceptions by the appellant, plaintiff in error here. In keeping with what Justice JOHNSTON decides in the opinion to which I have referred, I desire to call the attention of this honorable court to section 203, found at page 258 of Proffatt on Jury Trial, wherein the author proclaims the law to be that an exception to the form of the oath must be taken at the time of the trial. He makes use of the following language:

"Whenever any error is made in the administration of the oath, it should be objected to in the court below; the objection cannot be made in the appellate court for the first time. So, where the record shows that the jury were sworn the truth to speak upon the issue joined, the court above will hold the oath sufficient, especially if not objected to below."

The author cites in support of that proposition, *Chandler v. Hammond*, 23 Ga. 493; *Wrocklege v. State*, 1 Clarke, Iowa, 167.

The Supreme Court of Ohio in the case of *John Boose v. The State of Ohio*, 10 Ohio St. 575, sustains the views of the Kansas Supreme Court in the case at bar. The court in that case says:

"The record of a judgment in a criminal case which shows that the jury, upon being '*impaneled and sworn the truth to speak upon the issue joined between the parties*,' and after having heard the evidence and charge of the court, upon their oaths did say that the defendant is guilty as charged, etc., is sufficient, without the addition of the words '*according to the law and the evidence*,' in connection with the oath to render a verdict on the issue joined."

In the case of *Bartlett et al. v. State of Ohio*, 28 Ohio St. 672, the Supreme Court of Ohio uses the following language:

"The record states that certain persons (naming them) were impaneled and sworn to well and truly try and true deliverance make; but the form of the oath administered is not given, nor does the record purport to give it. It only states, as though it were giving a history of the trial, that a jury was impaneled and sworn. If the oath administered was insufficient or improper, it was the duty of the party to incorporate into his bill of exceptions the form of oath used, in

order that a court of error may see whether it was the proper one or not. But we are unable to tell from this bill whether the jury was sworn by the uplifted hand, by the book, or whether they affirmed."

This I think is an absolute parallel case with the case at bar. The record in this case does not purport to give the form of oath administered, or the manner in which it was administered, whether by the uplifted hand, by the book, or whether they affirmed.

We find in 26 Miss., in the case of *Dyson vs. The State of Mississippi*, on pages 379, 380, and 381, that a case like the case at bar was pending, and the court, in passing upon the propositions involved in that case, used the following language:

"It is not the duty of the clerk, in making up the record of proceeding in a cause, to set out the oath administered to the jury. All that is required of him in this respect, under the law as settled by this court, in reference to courts of general jurisdiction, is, that the record should show that the jury were sworn. And we are not disposed to extend this rule beyond its strict limit. If he undertakes to state other things connected with the administration of the oath, these additional statements would be unofficial, and not properly a part of the record."

The court again say:

"The statement of the oath administered, is no more a part of the duty of the clerk than it is his duty to incorporate in the record any document or deposition offered in evidence in the course of the trial.'

Again they say:

"If, then, the swearing of the jurors is improper in any respect, the objection must be presented by bill of exceptions; and unless it is so presented, if sufficient appears of record to show that the jury were sworn, it must be presumed that they were legally sworn."

And they further say:

"In the present case, it appears manifest that it was not intended by the clerk, as it was no part of his duty, to set out the oath in the manner or form used in administering it to the jurors. The statement is by way of recital, thus: 'And thereupon came a jury of good and lawful men, to wit,' &c., 'who, being elected, tried, and sworn the truth to speak in the issue joined,' referring to what had previously taken place, in order to show that an oath had been administered, rather than to state its form or substance. It is a memorandum relative to a proceeding in the case, made after the fact had transpired, and not the record of the very thing done at the time and in the manner and form in which it was done."

When we take into consideration that the statutes of Kansas nowhere prescribe the form of oath, or the manner in which it should be administered, it is safe to conclude that it was no part of the duties of the clerk to incorporate in his minutes the form of oath, or manner of oath to be administered in this case. It was only his duty to note the fact, as he did in the case at bar, that the jury were sworn in the manner provided by law. In all the criminal cases that have ever been appealed from the district to the Supreme Court of the State of Kansas, a record in each and every instance has been similar to the one in the case at bar has been made, and no objection has ever been made to that kind of record, nor has it ever been contended that the record purports to give the form of oath administered to the jury.

Inasmuch as counsel for plaintiff in error has cited copiously from the Alabama decisions, I desire to call the court's attention to the language of the Alabama court in the case of *Crist v. The State*, 21 Ala. 149. They say:

"However unclerical may be several of the terms found in this record, and however much it may be regretted that, in a record of so grave a character, any deviation from the appropriate language of ordinary forms may occur, yet on the record, such as it is, there is no rational ground for doubt as to whether the jury were sworn before they entered upon the discharge of their highly responsible duties. The entry recites: 'This day came the State of Alabama, by its solicitor, and also came the defendant in person and by counsel, and a plea of not guilty having been made at a former day of the court, thereupon came a jury, to wit: (here follow twelve names,) good and lawful jurors, who were selected and impaneled well and truly to try the issues joined between the State of Alabama and the said defendant; and after the evidence of all the witnesses had been given in, and the argument of counsel had been heard, the jury received the charge of the court, and retired in charge of the sheriff to make up their verdict, and now return into court and *on their oaths* do say, we, the jury, find the defendant guilty,'" etc.

Again, they make use of the following language:

"Here we have the terms 'good and lawful jurors' returning their verdict 'on their oaths,' grouped together in the same entry. It would

be difficult to arrive at any other reasonable conclusion than that they were sworn. With a knowledge of the practice universally prevailing in this State, of swearing the jury in all cases before the testimony is introduced, it is not carrying the doctrine of intendment in favor of the regularity of the proceedings in courts of general jurisdiction too far, or to an unauthorized extent, to hold that the jury in this case were sworn before they heard the testimony. It is enough that the records of such a court are certain to a certain extent in general. It is not necessary that they should be certain to a certain extent in every particular, so as absolutely to exclude every possible conclusion, and all argument, presumption or inference against them."

It may be said by counsel for plaintiff in error that this opinion has been practically overruled by subsequent opinions of the same court. That may be said truly of all opinions of the Supreme Court of Alabama upon this proposition. In fact, that court has waved backwards and forwards, on both sides of the line, so frequently that its judgment, or opinion, upon that proposition is scarcely to be relied upon.

After a careful consideration of all the questions involved in this matter, I arrive at the conclusion that there are but two questions to be considered in this case: one, Has this court jurisdiction? and the other is, Was the jury sworn? If this court has not in any manner obtained jurisdiction so as to pass upon the errors complained of in this case, there is but one thing to do, and that is to affirm the opinion of the Supreme Court of the State of Kansas. If this court has obtained jurisdiction of the subject-matter in this case, then it can only pass upon the question of the sufficiency of the jury. I think that question, in the light of the opinions I have cited, and the reasoning of the Kansas Supreme Court, ought to be resolved in favor of The State, the defendant in error.

S. B. BRADFORD,

Attorney General of the State of Kansas.

TRANSCTIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES

TERM 1887.

No.

WILLIAM BALDWIN, PLAINTIFF IN ERROR,

vs.

THE STATE OF KANSAS, DEFENDANT IN ERROR.

ERROR TO THE SUPREME COURT OF THE STATE OF KANSAS.

TRANSCTIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES

TERM 1887.

No.

WILLIAM BALDWIN, PLAINTIFF IN ERROR,

vs.

THE STATE OF KANSAS, DEFENDANT IN ERROR.

ERROR TO THE SUPREME COURT OF THE STATE OF KANSAS.

INDEX.

	Original.	Print.
Information	1-2	1-2
Venification to information	2	2
Arraignment	3	3
Plea of "not guilty"	3	3
Names of jurors and swearing of same	3-4	3-4
Jury sworn to "well and truly try the issue joined herein" as shown by the record	3	3
Jury sworn, as shown by Bill of Exceptions, "to well and truly try the issues joined herein"	6	5
Fitzgerald, testimony of commences on	8	6
And continues to	24	25
Fitzgerald occupies house with Mary Baldwin on night of murder	8	6
Discovers panel out of door	8	7
Starts to water the flowers	8	7
Discovers burglary	8	7
Enters Burrows' department	8	7
Waters flowers after burglary is discovered	8	7
Goes into parlor	8	7
Charlie plays piano	8	7
Fizgerald examines books	8	7
Discovers Mary's body	8	7
Goes for help	8	7
Things generally upset	10	9
Sees Mary's clothes on chair	10	9
Talbot took pillow off her head	10	9
Fitzgerald took pillow off her head	10	10
Goes to Baldwin's house on March 23rd	11	10
No one occupied room with him	12	11
Spaulding had not	12	11
Spaulding had not been there to water flowers before	12	12
Had been there	12	12
Had not been there	13	13
Did not change clothes on evening of 7th	12	12
Did change them on evening of 7th	13	13
Mary was sitting on porch on evening of 7th	13	13
	14	14
Was about 25 minutes changing his clothes	13	13
The hall door opposite his room was unlocked on evening of 7th	13	13
All he had to do was to turn	13	13
He don't know whether it was unlocked or not	13	13

	Original.	Print.
He forgets	13	13
Don't know whether he tried it that evening or not.	13	13
Don't recollect whether he watered the flowers or not	13	13
Don't know whether it rained or not	13	14
It probably did	13	14
It was a bright evening	14	14
Sun was shining	14	14
Was not raining	14	14
Cannot say whether sun was shining or not	14	14
	14	15
Got in between 11 and 12 o'clock	15	15
The key was in the door that led from his room into the vacant room on his side	15	16
On the 8th, for the first time, he asks Spaulding to go with him to water the flowers in the forenoon	15 16 21	16 17 23
The trunk had been removed from against the door in the vacant room	17	18
He gets the key of Mary that admits him to the vacant room	17	18
He had lost the key to his		
Discovered the burglary	18	19
Waters the flowers	18	20
Throws the panel upon the porch and proceeds to water the flowers	19	20
Lingers at the piano and center table	19	21
Approaches Mary's room	19	21
Sees her clothes on the chair and is struck that all is not right	20	22
Had carried 7 or 8 buckets of water from back yard after discovering burglary and before investigation	21	23
Has faint recollection of feeling coming over him during night	22	24
Spaulding's testimony, shutters were closed	24	25
When Baldwin came	34	32
He said "Is that my sister; *can it be my sister*"	29	28
Knelt by her bedside	35	32
Seemed depressed	35	33
Lived 3 or 4 blocks away	39	33
Had never stayed with Fitzgerald all night	32	29
No one but Mary Baldwin and Fitzgerald occupying house	32	29
	39	33
Worden's testimony	40	33
To	44	34
When reached house, wanted to know what the matter was	40	34
Expresses surprise at her death; says "Is that so;" "My God, is that Mary!"	40	34
Sheds tears	44	34

	Original.	Print.
Mrs. Farries' testimony	46	34
Mrs. Baldwin went to Bloomfield 2 or 3 weeks before Mary's death	47	35
Panel sawed out of door	48	36
Saw dust on floor	48	36
Mary lying diagonally across bed	49	37
Gown smooth to ankles	49	37
Left breast exposed	49	37
Bed out from wall at foot about 18 inches	49	37
States condition of room	50–51	39
Pocket book open and empty on floor	51	39
House disarranged	51	39
Never heard Baldwin say bad word to Mary	52	40
Dr. Campbell's testimony	61	41
To	78	44
Fails to recognize bottle		
Charles W. Benning's testimony	78	44
To	80	45
Baldwin shows anxiety; "Is she dead;" "Is she dead"	80	44
Takes him out of the room and he returns twice	80	45
Albert H. Lewis' testimony	88	45
To	133	53
Was engaged to be married to Mary	88	45
Mary wants to be married at once	97	47–8
Leaves her at the Baldwin mansion on night of her death about 9:25	97	46
She was cheerful	97	47
But urged the marriage	98	48
For several reasons of her own	102	50
Had done so before	98	48
And would disclose to him the reason the next time he come	98	48
Wanted to tell him something, but *still* did not *seem melancholy* or *disappointed*	98	48
He could never imagine what it was	98	48
House left in charge of Fitzgerald and Mary, the former of whom was left there for her *protection*	98	48
Frank Price's testimony	133	53
To	135	55
Opinion of Price as to what the appearance of his face indicated. Exception	135	55
John Donahue's testimony	143	56
Opinion of Donahue	144	57
Objection and exceptions	144	57
Testimony of his alleged conduct, for four months after Mary's death, admitted	144	57
Supreme Court says it is inadmissable, irresponsive, irrelevant and ought to have been stricken out, but as the charge against which he was de-		

	Original.	Print.
fending, was only poisoning his sister, it could not have prejudiced him with the jury	270	84–5
Charles T. Baker's testimony	145	57
Baldwin was sick and went out on night of Mary's death	145	57
Work as usual next day	147	59
Saw nothing unusual in conduct	147	59
Beriswarger's testimony	149	60
Fails to recognize bottle, lable or Baldwin		
Samuel James' testimony	152	63
Wortsell's testimony	154	63
James Bosanko's testimony	167	65
Lewis Haynes' testimony	173	67
Does not know defendant went to St. Joseph	230	68
John M. Crowell's testimony	233	69
Defendant looked guilty to his experience. Exception	233	70
Held competent by Supreme Court	272	87
Instructions asked and refused. Excepted to	232–40–1	70–1–2
Instructions given and excepted to	244–55	72–3
Verdict	255	73
Motion for new trial	257	74
Order overruling same and sentence	260	74–5
Opinion Supreme Court	264	Et. Seq.
Mandate for execution	278½	95–6
Motion for rehearing	279	96
Finding Supreme Court that Constitution U. S. not violated	288	101
Exception	288	102

IN SUPREME COURT, STATE OF KANSAS.

BE IT REMEMBERED, That on the 30th day of January, 1886, there was filed in the office of the clerk of the supreme court of the State of Kansas a record and bill of exceptions, of which the following is the information and record, in the case of the State of Kansas against William Baldwin, to wit:

UNITED STATES OF AMERICA, THE STATE OF KANSAS, COUNTY OF ATCHISON.

In the district court of the Second Judicial District of the State of Kansas, sitting in and for Atchison county, at its November term, 1885.

THE STATE OF KANSAS, *Plaintiff*,
vs.
WILLIAM BALDWIN, *Defendant*.

INFORMATION.—FIRST COUNT.

W. D. Gilbert, county attorney in and for the county of Atchison, in the State of Kansas, in the name and by the authority of the State of Kansas, comes here, into the said district court of the said Atchison county, on this, second day of November, in the year of our Lord one thousand, eight hundred and eighty five, and gives the said court to understand and be informed, that the defendant, William Baldwin, late of said county of Atchison, State of Kansas, on or about the 8th day of July, A. D. 1885, in the said county of Atchison, State of Kansas, then and there being, did then and there unlawfully, wilfully, deliberately, premeditately, purposely, feloniously, and with malice aforethought, assault, kill, and murder, one Mary Baldwin, a human being, then and there being, by then and there unlawfully, wilfully, deliberately, premeditately, purposely, feloniously, and with malice aforethought, administering to the said Mary Baldwin an anesthetic, to wit: chloroform, and other like poisons, said anesthetic, the and there so administered as aforesaid, by said defendant, William Baldwin, to said Mary Baldwin, being then and there a deadly poison, with the felonious intent then and there, purposely, unlawfully, wilfully, premeditately, and with malice aforethought, her, the said Mary Baldwin, to kill and murder, contrary to the form of statute in such case made and provided, and against the peace and
1 dignity of the State of Kansas.

SECOND COUNT.

W. D. Gilbert, county attorney in and for the county of Atchison, in the State of Kansas, in the name and by the authority of

the State of Kansas, comes here, into the said district court of said Atchison county, on this second day of November, in the year of our Lord one thousand, eight hundred and eighty five, and further gives the said court to understand and be informed that the said defendant, William Baldwin, late of said county of Atchison, State of Kansas, on or about the eighth day of July, A. D. 1885, in the said county of Atchison, State of Kansas, then and there being, did then and there unlawfully, wilfully, deliberately, premeditately, purposely, feloniously, and with malice aforethought, assault, kill and murder one Mary Baldwin, a human being, then and there being, by then and there unlawfully, wilfully, deliberately, premeditately, purposely, feloniously, forcibly, and with malice aforethought, pressing a pillow on, over and against the mouth, nose and face of her, the said Mary Baldwin, thereby preventing respiration and producing death of her, the said Mary Baldwin, by reason thereof, the said Mary Baldwin then and there died; with the felonious intent then and there purposely, unlawfully, wilfully, deliberately, premeditately, and with malice aforethought, her, the said Mary Baldwin, to kill and murder, contrary to the statute in such case made and provided, and against the peace and dignity of the State of Kansas.

W. D. GILBERT,
Attorney of Atchison County, State of Kansas.

THE STATE OF KANSAS, } *ss.*
County of Atchison, }

W. D. Gilbert, of lawful age, being first duly sworn, upon oath deposes and says, that he is county attorney of Atchison county, State of Kansas; that he has read and knows the contents of the foregoing information, and that the allegations, statements and averments therein contained as subscribed by him are true,
2 according to the best of his information and belief.

W. D. GILBERT,
County Attorney of Atchison County, State of Kansas.

Subscribed and sworn to before me this 2d day of November, A. D. 1885.

JOHN MOORE,
Clerk of the District Court.

Endorsed on back as follows:

Information No.....

The State of Kansas vs. William Baldwin.

Witnesses for the State: Michael Fitzgerald, Charles Spaulding, Mrs. H. V. Farries, W. A. Ferguson, C. Ferguson, W. W. Campbell, I. W. Sandly, W. M. Gough, D. J. Holland, W. W. Cochran, Herman Mathei, Albert A. Lewis, Mrs. M. A. Baldwin, Mrs. M. Stratton, Eliza Benning, Florence Farries, Bernice Farries, Kate

Talbott, Louise Hames, John Hanthorne, J. Hoaskins, Frank Price, C. W. Benning, C. Weaver, J. J. Locker, Samuel Beck, J. C. Crall, Joseph Talbott, A. W. Bartlett, John M. Crowell, Mrs. Jennie Hellener.

Presented in open court and filed November 2d, 1885.

JOHN MOORE,
District Clerk.

Witnesses for the State: E. Worstall, L. James, John Donahue, C. T. Baker, H. L. Whitaker, Nick. Whelan, Jacob George, S. E. Ferguson, Henry Clockman, D. E. Stanley, F. L. Vandergrift, W. A. Shephard, R. A. Park, A. M. Worden, James Bosanko, John Lockton, B. F. Bingswanger, Abe Zahn, S. D. Smith, Clara Nickerson, Ed. Ainsworth, Arthur Ainsworth.

Thereafter, on the 7th day of November, 1885, the said defendant, William Baldwin, being arraigned in open court on said information, and the same being read to him, he plead "not guilty" thereto, and of such arraignment and plea the following journal entry was made, to wit:

November 7th, 1885.

STATE OF KANSAS, *Plaintiff*,
vs.
WILLIAM BALDWIN, *Defendant*.

Now in this case the plaintiff appeared by W. D. Gilbert, county attorney, its attorney, and the defendant appeared in person
3 and by Everest & Waggener, his attorneys, and the defendant being arraigned, and the information being read to him, and in his hearing, and he being required to plead thereto, plead not guilty to murder in the first degree, as charged in the information filed against him.

November 11th, 1885.

THE STATE OF KANSAS, *Plaintiff*,
vs.
WILLIAM BALDWIN, *Defendant*.

Now in this case the plaintiff appeared by W. D. Gilbert, county attorney, and S. H. Glenn, its attorneys, and the defendant appeared in person, and by Everest & Waggener, his attorneys, and the issue being joined upon a plea of not guilty, came a jury, towit:

C. A. Miller, Richard Ayers, Charles Hicks, J. H. Artman, H. B. Dale, John Ernst, Sr., Thomas Collier, George W. Bowser, John Burns, J. S. Allen, Robert Sparks and Arthur Lacy, twelve good and lawful men, having the qualifications of jurors, who being duly elected, tried and sworn well and truly to try the issue joined

herein, pending the introduction of testimony, the court adjourned until to-morrow morning, November 12th, A. D. 1885, at nine o'clock.

THURSDAY MORNING, November 12th, 1885.

THE STATE OF KANSAS, *Plaintiff*,
vs.
WILLIAM BALDWIN, *Defendant*.

This case was again resumed before the same jury. The plaintiff appeared by W. D. Gilbert, county attorney, its attorney, and the defendant appeared in person, and with Everest & Waggener, his attorney, and the jury having heard part of the evidence, pending the further introduction of testimony the court adjourned
4 until tomorrow morning, November 13th, A. D. 1885, at nine o'clock.

November 13th, 1885, 9 o'clock.

STATE OF KANSAS, *Plaintiff*,
vs.
WILLIAM BALDWIN, *Defendant*.

This case was resumed before the same jury. The plaintiff appeared by W. D. Gilbert, county attorney, its attorney, and the defendant appearing in person and by Everest & Waggener, his attorneys, and the jury having heard part of the testimony, pending the further introduction of the evidence the court adjourned until tomorrow morning, November 14th, A. D. 1885, at nine o'clock.

November 14th, 1885.

THE STATE OF KANSAS, *Plaintiff*,
vs.
WILLIAM BALDWIN, *Defendant*.

This case was again resumed before the same jury, the plaintiff appearing by W. D. Gilbert, county attorney, its attorney, and the defendant appearing in person and by Everest & Waggener, his attorneys, as heretofore, and the jury having heard part of the evidence, pending the further introduction of testimony the court adjourned until Monday morning, November 16th, A. D. 1885, at nine o'clock.

November 16th, 1885.

THE STATE OF KANSAS, *Plaintiff*,
vs
WILLIAM BALDWIN, *Defendant*.

This case was again resumed before the same jury, the plaintiff appearing by W. D. Gilbert, county attorney, its attorney, and the defendant appearing in person and with his attorneys, Everest &

Waggener, and the jury having heard all the evidence, the
5 court adjourned until tomorrow morning, November 17th, A. D. 1885, at nine o'clock.

November 17th, 1885.

THE STATE OF KANSAS, *Plaintiff*,
vs.
WILLIAM BALDWIN, *Defendant*.

This case was again resumed before the same jury, who having heard all the evidence, the instruction of the court, and the arguments of counsel, retired under charge of a sworn officer to consider of their verdict, and afterwards, to wit, on the 18th day of November, A. D. 1885, returned into court, and through their foreman presented into court, their said verdict, and which said verdict is in words and figures as follows, to wit:

THE STATE OF KANSAS, *Plaintiff*,
vs.
WILLIAM BALDWIN, *Defendant*.

VERDICT.

We, the jury, duly empanelled, charged and sworn in the above entitled action, do, upon their oaths, find the defendant, William Baldwin, guilty of murder in the first degree, as charged in the first count of the information.

JOHN ERNST, *Foreman*.

Thereupon, it is ordered by the court that the said William Baldwin be imprisoned in the county jail of Atchison county, Kansas, and there to wait the further order of this court.

IN THE DISTRICT COURT, ATCHISON COUNTY, STATE OF KANSAS.

THE STATE OF KANSAS, *Plaintiff*,
vs.
WILLIAM BALDWIN, *Defendant*.

BILL OF EXCEPTIONS—NO. I.

BE IT REMEMBERED, On this, 14th day of November, A. D.
6 1885, at the November term, A. D. 1885, of said court a jury was empanelled and sworn to well and truly try the issues joined herein, and the plaintiff, the State of Kansas, to maintain the issue on its part introduced the following evidence in order, to wit:

7 IN THE DISTRICT COURT OF ATCHISON COUNTY, STATE OF KANSAS.

THE STATE OF KANSAS, *Plaintiff*,
vs.
WILLIAM BALDWIN, *Defendant*.

Michael J. Fitzgerald, sworn, testified on behalf of the State as follows on direct examination:

Q. Give your name in full.
A. Michael James Fitzgerald.
Q. Where do you live?
A. 1001 Commercial street.
Q. In the city of Atchison?
A. Yes, sir.
Q. How long have you lived in the city of Atchison?
A. Since the 22d day of last March.
Q. Where have you been living since you came to the city?
A. Most of the time at 1101 Commercial street.
Q. State where you were on the evening of the 7th of July last?
A. I was at Harmony Garden picnic.
Q. What time did you get home?
A. Between half past 11 and 12 o'clock.
Q. Where was your home then?
A. 1101 Commercial street.
8 Q. Who lived there?
A. Mrs. Baldwin and Mrs. Barrows.
Q. State now if any person occupied the house at that time, on the 7th of July?
A. Miss Mary Baldwin.
Q. Did you see her on the 7th day of July at any time?
A. I think I did, sitting on the front porch.
Q. What time in the day?
A. About seven o'clock in the evening, when I came home from work.
Q. Anybody with you?
A. No, sir.
Q. See her afterward that day?
A. No, sir.
Q. You say you came to your room in that house about what hour?
A. What evening?
Q. Evening of the 7th.
A. About 7 o'clock.
Q. What time did you get to your room on the evening of the 8th?
A. About 7 o'clock.
Q. State what you discovered about the place on the evening of the 8th; go on and state how you entered your room and about the circumstances.
A. When I came home I went up the side stairs to dress, as usual; I had to go up there to get in my room; the screen door on the outside was locked, and when I went there I took down the key; I looked

on the side of the door; I took the key down and opened the door, and I and Mr. Spaulding went into my room, and first Charley says—object to Charley—witness: I didn't change my clothes; at least I went down to water the flowers.

Q. State right here what you mean by watering the flowers—whether you had charge of watering the flowers?

A. There was a family living in the house by the name of Barrows, and they were on a visit to Maine, and left I and Charlie in charge of the place until they came back, and she had a nice flower garden and every evening when we came home from work we used to water the flowers, every evening when we came home from work, and this evening we started to water the flowers, and went to go through the hallway, through the door, so I could go down stairs into Barrows' parlor, and went to go through that door and it was locked; I could not go through; I went into my room and into the vacant room, and went right along the side of the hallway down by Mary's room, down to Barrows' parlor, and started to unlock the door, and from the reflection of the light, I saw the panel of the door. I says, "Hallo, the house has been burglarized again," and went back and looked around and saw indications of a burglar being in there, so I says, "let us go in and see and see if anything is gone in Barrows' department." Everything was all right there, and went and watered the flowers. While we were watering the flowers Charlie says, "We better take a survey of the premises again, and look around at the door," and we went into the front parlor, and went through the kitchen and began to look around at the door, and went into the parlor and there Charlie started to sit down and play something on the piano, and he got up again and I was looking at some books on the table, and I went out and went up stairs, and as I went up to the head of the stairs, I noticed the tray out of a trunk sitting at the head of the stair in a little vacant room, and Mary's door half open, and I looked in there and jumped back, and I says "Oh, my God," and he asked me, "What is the matter?" and I says, "Don't ask me, let us go down and get somebody." And we went up and called Lockton, and Worden and Mr. Talbott.

Q. What time in the evening was it you made that discovery on the 8th of July?

A. About 7 o'clock.

Q. Was it before or after sundown?

A. After sundown.

Q. After or before sundown?

9 About 7 o'clock in the evening, generally light in the evening at 7 o'clock.

Q. Daylight?

A. Yes sir I think the sun had not gone down yet.

Q. Now describe to the jury just how Mary's room was, where you discovered her in relation to that house.

A. Her room was in the southeast corner of the building, it is

kind of a double house and my room on the opposite corner, on the southeast corner of the building. There was two or three partitions between my room and her room.

Q. Take this plat and see if it is correct, the plat of the room, then examine that and see if it is a plat of the lower part of the house. Is that correct?

A. Yes sir.

Q. This kitchen has a porch to it north?

A. Yes sir.

Q. That is the door at the place, north door?

A. Yes sir that is the door had the panel cut out of it.

Q. How does the door swing?

A. I don't know. Never noticed.

Q. Swing in or out?

A. I can't say.

Q. This kitchen is off the west, that dining room off to the west?

A. Yes sir.

Q. Mrs. Barrows, what is the Barrows kitchen, that is in the east?

A. Yes sir.

Q. With a lattice porch to the north of it?

A. Yes sir.

Q. Door going out into that?

A. Yes sir.

Q. Front part of the house was to the south?

A. Yes sir.

Q. Entered the hall there?

A. Yes sir.

Q. Then to your right was the door entered where?

A. Into Barrow's parlor.

Q. You left the door and entered the parlor?

A. Yes sir.

Q. Describe the course you took after you came down stairs?

A. I went to the, this door to open it into Barrows parlor, to go into her dining room to go into the main part to get the sprinkler, they always kept the sprinkler and buckets in there, to get to water the flowers, and started to go into this parlor and looked back here is the door that is open, the door leading here where the panel was cut out reflected the light where it was, as we went into the parlor door we went right back there: this is supposed to be the kitchen, and this is the dining room, then we went round into here and did not go into the parlor until after we went the second time, we went to make a thorough search and investigation of the place the second time.

Q. How did you come back into the house after you went up stairs?

A. Came down into the kitchen and back into the parlor and went in and got the sprinkler after that, when we came back, came along, seems came in this way, I think we came in the back door

right in through there, and went back into the kitchen again, and into this dining room, and into this parlor and examined things around there and went back up stairs.

Q. What did you find in this dining room before you got in there? What was the condition of things inside in general?

A. Upset in general as though there had been a burglar in there, the drawers kind of pulled out, and things scattered around, cake box on the table right here, I made the remark, I supsosed when they were in there before, they took a little eatables, and I made the remark I didn't suppose they took any cake.

Q. Describe how you got up stairs.

A. Came back into the parlor and into the dining room and kitchen, and went right up stairs, stairway here, up those stairs.

Q. Where was Mary's bedroom with reference to Barrow's room below?

A. This is the bed room, here is where we found Mary.

Q. Is it the southeast room up stairs over Mrs. Barrow's parlor?

A. Yes sir, as we got at the head of the stairway, little bit of a bed room, tray of a trunk lay there.

Q. Found the tray of a trunk lying there, where did you go then, is this the entrance to Mary's bed room?

A. Yes sir, came around here, came right along here, the door was open and I just kind of looked in, I saw her clothes lying on a chair, and something struck me right there everything was not all right, I saw something lying on the bed, I could not tell who it was, whether it was Mary Baldwin or not.

Q. Describe to the jury her appearance on the bed, what was on her?

A. When I first looked there was a pillow lying over her head, when I first looked in I knew there was a woman lying there before from her head, I supposed she was dead. I did not stop to see anything, I went down to call assistance. I think Talbott took the pillow off her head, her neck was blue, I thought she had been choked to death and picked up a bottle at the foot of the bed down near her feet.

Q. What did you say you found near her feet?

A. I saw him pick up a bottle right near her feet.

Q. Did you notice the bottle?

A. I noticed the bottle, a little vial about that long, they were trying to ascertain what was on it, the direction.

Q. What time did you go to that house on the evening of the 7th?

A. I think it was between half past 11 and 12 o'clock.

Q. Did you remain there during the night?

A. Yes sir.

Q. On the evening of the 7th?

A. Yes sir.

Q. What time did you get there on the evening of the 8th?
A. About 7 o'clock, about the time I came from work.
Q. Where had you been?
A. To work.
Q. Where do you work what is your business?
A. Machinist by trade.
Q. Where do you work?
A. Central Branch railroad shops.
Q. Now take this plat and describe to the jury how you entered your room and where it is &c.
A. I came in and came up this side stairway, a little bit of a porch out here, and a screen door, that screen door was shut like, and key right above the door, and took the key down, room came into the hallway, this is my bedroom here, and led into another hall that led into this stairway, and I reached in my hand there and pulled up the catch and night lock on the door, I came in here into my bed room and changed my clothes, this door is always left open, here I came down into Barrows, came into Barrows bed room, came through and got the sprinkler to water the flowers evenings.
Q. You found this door locked?
A. Yes sir, never was locked before while I was watering the flowers. She left it open.
Q. You went back into the other room and came out here?
A. Yes sir.
Q. Into this bed room here, this is vacant, nobody occu-
11 pying it?
A. No sir came out this hallway, and went round up by her door and did not notice anything at all until I got right up stairs.
Q. Who did you say was with you on that time on the evening of the 8th?
A. Mr. Spaulding.
Q. Now then did you say that you when you went up stairs, you went to Mary's bed room and discovered her lying there with the pillow on her face?
A. Yes sir.
Q. How were her features if you remember?
A. When I first went up I did not notice her, after the second time I went in and took the pillow off her head her face was lying more to the left, and her right hand on a right angle at about forty five degrees like in that position.
Q. How long after the first time that you noticed her before you were there the second time?
A. Not more than three or four minutes.
Q. Had anybody been there after you were there first until you were there the second time?
A. Could not I don't think very well.
Q. Who was with you when you went there the second time?

A. Mr. Talbot and Mr. Lockton and Worden and Spaulding.
Q. All entered together?
A. Yes sir about the same time, think Mr. Bosanko came along and two or three more. Quite a crowd gathered around, then I could not say who went in first.
Q. Those persons who you have named were the first persons who were there?
A. Yes sir.
Q. You say no person could have been there, in there?
A. No sir I don't think they could hardly.

CROSS EXAMINATION.

Q. When did you go to the Baldwin house to board?
A. I think about the 23d or 22d day of March.
Q. You had been there then about four months?
A. I should think so, yes sir.
Q. During that time Mrs. Baldwin and Mary resided in the house?
A. Yes sir.
Q. Did you take your meals there?
A. Not with the Baldwins, I took them with the parties lived in the house, Mr. Barrows.
Q. You took your meals there in the house, all the time you lodged there except during the absence of Mrs. Baldwin and Mrs. Barrows?
A. Yes sir.
Q. What time did you usually get into your room at night?
A. When I came from work, about 7 o'clock generally.
Q. About 7 o'clock?
A. Yes sir.
Q. Where did you usually remain in the evening while you boarded there?
A. Usually took a walk down town, sometimes stopped into Barth's.
Q. What time did you usually get home?
A. About 10 o'clock.
Q. That was your usual custom?
A. Yes sir.
Q. No one occupied that room with you?
12 A. No sir.
Q. Occupied it alone?
A. Yes sir. Once in a while I would have a friend there to sleep.
Q. Had Mr. Spaulding occupied it with you?
A. No sir.
Q. How long had Barrows been away previous to this death?
A. I don't know, three or four weeks, something like that, three weeks.
Q. This place was left in charge of you and Mr. Spaulding?

A. Yes sir.

Q. During Mr. and Mrs. Barrows' absence had Spaulding been there to water the flowers, had he been there?

A. No sir he had not.

Q. Who had the watering of the flowers?

A. I had the watering of the flowers.

Q. Every evening?

A. Yes sir.

Q. You had not missed a single evening since their absence?

A. No sir only when it rained.

Q. Of that are you positive?

A. I think I am.

Q. What kind of a day was Tuesday, a clear day, July 7th?

A. I could not now tell whether it was a cloudy day or a clear day.

Q. Where did you get your supper that day?

A. At the Tri Mountain house.

Q. What time?

A. 20 minutes past six.

Q. How far is that house from the Baldwin house?

A. About half a mile, not quite half a mile.

Q. After you got your supper where did you go?

A. Up to the Baldwin house.

Q. Did you change your clothes there?

A. Yes sir.

Q. Did you see Miss Mary Baldwin in there, when you went there on the evening of the 7th?

A. I did not change my clothes on the evening of the 7th.

Q. You did not change your clothes?

A. No sir.

Q. When you went there after you got your supper what time did you get there?

A. 7 o'clock, about 7 o'clock.

Q. For what purpose did you go there?

A. That evening?

Q. Yes sir on 7 o'clock on Tuesday of the 7th?

A. I went there for the purpose of changing my clothes and watering the flowers, I roomed there.

Q. Did you change your clothes?

A. No sir not that evening.

Q. Why didn't you?

A. Because Mr. Spaulding was with me, and he wanted to go up to his room and change his clothes and he said let us water the flowers first.

Q. On Tuesday of the 7th?

A. Yes sir.

Q. Spaulding was with you?

A. Yes sir.

Q. You did not change your clothes in the evening, and of that you are positive?

A. No sir not until after the occurrence was all over.

Q. Now I will ask you where you went on Wednesday, the
13 evening of the 8th, and did you change your clothing that evening?

A. Yes, sir; I was in the house the evening she was discovered; I believe she was discovered the eventing of the 7th or 8th, which was it?

Q. 8th.

A. I was there in the house.

Q. You say she was discovered on the evening of the 8th. When do you say it was?

A. I will say this, I changed the evening before the discovery; that is the evening of the 7th, Tuesday, yes sir I changed my clothes and walked down town.

Q. You got there about 7 o'clock?

A. Yes sir.

Q. Spaulding with you?

A. No sir.

Q. You went directly to your room?

A. Yes sir.

Q. When you got on the premises did you see Miss Baldwin?

A. I think she was sitting on the front porch.

Q. As you went in?

A. Yes sir.

Q. How long were you changing your clothes?

A. About twenty-five minutes.

Q. As you went to your room did you notice the hall door up stairs, opposite your room whether it was open or closed?

A. The hall door opposite to my room on the evening of the 7th, yes sir.

Q. What condition was it in?

A. Unlocked, all I had to do was to turn.

Q. The east door of that hall?

A. That is what I mean.

Q. It was unlocked?

A. Yes sir.

Q. Did you try it?

A. Yes sir, I ain't positive whether it was in the evening.

Q. I asked you on the evening of the 7th when you went there to change your clothes, if the east hall door was locked or unlocked?

A. I forget whether it was that evening, I ain't positive whether I tried it that evening or not. If it rained the day before I did not try it, because I never went down, I had to water the flowers.

Q. Do you know whether you watered the flowers on that day or not?

A. I don't recollect.

Q. Do you know whether the hall door was open or not?

A. I cannot say, if I watered the flowers it was open.
Q. What is your best impression about it?
A. I would not say, I think it was, she usually left it open.
Q. Not what she did in regard to that evening, what is your best impression whether you watered the flowers or not?
A. If it rained I did not water the flowers.
Q. What is your best impression whether it rained or not?
A. Probably, I would not say whether it rained or whether it did not.
Q. What do you think about it?
A. I don't think at all.
Q. Then you went directly to your room and changed your clothes and came out?
A. Yes sir.
Q. Went down the outside stair?
A. Yes sir.
Q. Of that you are positive?
A. Yes sir.
Q. Went down the outside stairs?
A. Yes sir.
Q. Do you recollect that as distinctly as any other fact?
A. That is the only way I have to get out of there, only
14 when Mrs. Barrows was living there.
Q. You have no recollection of going down to Mrs. Barrows' room on the evening of the 7th?
A. No sir.
Q. No recollection of that?
A. No sir, I can't say whether I went down or not.
Q. As you came down out of your room, did you see Miss Baldwin on her front porch?
A. Not when I came out, I do not think she was sitting there only when I came in.
Q. You did not see her when you came out?
A. No sir I cannot say I did.
Q. No lights burning?
A. No sir it was a bright evening, the sun shining.
Q. It was not raining then?
A. I don't think it was. No sir.
Q Sun shining then?
A. Cannot say whether the sun was shining or not.
Q. Didn't you say the sun was shining then?
A. There is usually sun in the summer about that time in the evening.
Q. How was it that evening?
A. I cannot recollect.
Q. You don't know whether the sun was shining or not, did you not have a light burning in your room?
A. No sir.
Q. You remember that?

A. Yes sir.

Q. Now when you came out of your room and went out into the yard did you see any person there?

A. I never noticed anybody, no sir.

Q. You noticed no person there?

A. No sir. I cannot recollect of seeing anybody.

Q. In your examination before the magistrate didn't you testity, as you went out you saw Mary Baldwin sitting on the porch, and Lewis was coming up the street.

A. I did meet Lewis, I think I met him though right in front of Mr. Talbott's.

Q. Who was with him?

A. I don't think anybody.

Q. What time was that?

A. I think about quarter past, probably halt past 7.

Q. You went into the house about 7?

A. I say quarter past seven or halt past seven.

Q. What is your best impression?

A. I will say halt past seven.

Q. Was it any later than half past seven?

A. I don't think it was.

Q. Was the sun down?

A. I don't know the exact time, I don't know whether the sun was down or not, I did not keep track of the sun from that time until this.

Q. Paid no attention to it whatever?

A. No sir.

Q. Did you keep track of the flowers?

A. Usually when I was there I did.

Q. Did you water the the flowers the Monday evening previous?

A. I cannot recollect what evening I watered them, I watered them when it did not rain.

Q. Have you any recollection of having watered those flowers any time previous to Wednesday evening, any particular day?

15 A. No sir, I have no particular day, only I watered them regular when it did not rain.

Q. You were there Sunday?

A. Yes sir.

Q. What portion of the day did you remain there?

A. Remained there Sunday morning when I got up, must have gone to breakfast.

Q. On the Sunday morning of the 5th, do you remember whether you watered the flowers or not on that day.

A. I think I did, I am not positive, I usually water them right along, I cannot give the exact day.

Q. This night you got in between half past 11 and 12 o'clock?

A. Yes sir.

Q. Was the moon shining?

A. I do not recollect whether it was or not.

Q. You did not keep track of the moon?
A. No sir.
Q. What makes you think it was about half past 11 or 12?
A. Because I looked at my watch when I left the garden, I was standing with a couple of young fellows on Main street and I think it was half past 11. We were standing there all together and I don't think we talked there but a short time and I went to my room.
Q. You went to your room, went in as usual?
A. Yes sir.
A. Did you light a lamp?
A. Yes sir.
Q. Did you go immediately to bed?
A. Yes sir.
Q. Did you try the hall door?
A. No sir.
Q. You did not notice whether it was locked at that time or not?
A. Always locked the hall door.
Q. Which way did the door open from your room into the hall, did it open into the hall or into the room?
A. Into the hall.
P. You carried the key to that?
A. No sir.
Q. What did you do with the key?
A. Miss Baldwin carried the key.
Q. Who carried the key to the door from your room to the vacant bedroom on the south?
A. That was stuck inside on my side.
Q. Of that you are positive?
A. Yes sir.
Q. You saw Spaulding Wednesday?
A. I saw him every day.
Q. You saw him Wednesday July 8th?
A. Yes sir.
Q. Say anything to him about watering the flowers?
A. Yes sir.
Q. What time?
A. In the day time during work.
Q. What did you tell him?
A. I told him he wanted to come up and help water the flowers, his mother had left now and he would have plenty of time to come up. His mother had been here on a visit and had went home, and every evening he was with her I watered the flowers myself.
Q. Who spoke about watering the flowers Wednesday evening, you or Spaulding?
A. I did.
Q. You did?
A. Yes sir,

Q. You said to him, come up and assist in watering the flowers?

A. I said to him he wanted to come up and help me water the flowers.

Q. Did you tell him you had been out late at night and was tired?

A. Yes sir.

Q. You told him that?

A. Yes sir, I was out to the garden the night before.

Q. On the preliminary examination didn't you testify, Spaulding said to you he was going up that day to water the flowers?

A. I don't recollect it, no sir.

Q. If you did so testify was it true?

A. I don't think it was.

Q. You asked Spaulding?

A. After I asked him he said he would.

Q. Before that?

A. No sir.

Q. I will ask you now if you did not say to Spaulding, that you had been out late the previous night and was tired and wanted him to assist you in watering the flowers that evening?

A. That is exactly what I said.

Q. Spaulding did not speak to you first on the subject?

A. No sir.

Q. This was about what time Wednesday?

A. Some time in the day when we were working in the shop.

Q. In the forenoon or afternoon?

A. I think in the forenoon, I ain't sure.

Q. It hadn't rained that day had it?

A. I did not keep track of the rain from that time.

Q. You weren't to water the flowers that day if it rained, your impression is it did not rain?

A. Yes sir.

Q. Are you willing to state now that it did not rain?

A. Yes sir.

Q. You did keep track of it?

A. It I started to water the flowers I did keep track of it.

Q. Now you stated it had not rained Wednesday?

A. I don't think it did.

Q. Did you and Spaulding eat supper together that night

A. Yes sir.

Q. What house?

A. Tri-Mountain house.

Q. What time did you leave the boarding house?

A. Half past six, or within twenty five minutes of seven.

Q. How far is that from the Baldwin house?

A. I think not quite half a mile.

Q. You went there together?

A. Yes sir.

Q. You went up stairs together. You found that door unlocked?

A. Yes sir found the screen door unlocked, she usually unlocked the side door?

Q. When you went into your room was your room door locked?

A. No sir.

Q. It was unlocked?

A. Yes sir.

Q. As you left it Wednesday morning?

A. Yes sir.

Q. After you had gone to into your room you came out
17 into the hall?

A. Yes sir.

Q. Came down the main stairway?

A. Yes sir.

Q. Found that door locked?

A. Yes sir.

Q. Which way did that door open, to the west or to the east?

A. The door in the hall opens to the east—I ain't sure whether it does or not, I am not positive how it does open.

Q. You have been down there a great many times?

A. Yes sir.

Q. When you found that door locked, you then went back through that door and through that vacant bedroom?

A. Yes sir.

Q. Was that door unlocked?

A. No sir—it was locked from my side and I unlocked it.

Q. Now I will ask you if there was not a large trunk immediately against that door in that vacant bedroom?

A. No sir.

Q. No trunk there at all?

A. No sir they had been moved because I had a friend with me, Mr. Spaulding, and I left him in bed in the morning and he takes the key of the door and puts it up over the frame and I could not find it, and I went to Talbott's and asked him if he left the key with him. I wanted to get into that room.

Q. Which way did you unlock it, from the vacant room?

A. Yes sir.

Q. The key was on that side?

A. Yes sir.

Q. Haven't you testified that the key was always on that side in that room?

A. From the time I discovered it, it was not always Iain't been in the house.

Q. While you were there?

A. No sir, not always.

Q. How long has it been on your side of the door?

A. About a week or two before Mary was murdered.

Q. When she took and opened the door for you the key was on the side of the vacant bedroom?

A Yes sir.

Q. Was there a trunk against the door?
A. I could not say.
Q. There was a large trunk in the room?
A. Yes sir.
Q. That you discovered?
A. Yes sir.
Q. When she opened that door for you, or when you went in, did you take the key?
A. She told me to use the key until I found the key to my door.
Q. When did you find your key?
A. I haven't found it yet, it is lying up there yet.
Q. You have never found it?
A. No sir.
Q. Since that time you have remained in your room without locking your door?
A. Yes sir.
Q. Now I will ask you it you did not testify, and haven't you testified you went into your room and locked your door that night?
A. I put in the latch in my door.
18 Q. When you went out of your room did you lock it?
A. No sir, I could not lock it.
Q. Didn't you testify, on Tuesday night you left there, you locked your door and also the hall door?
A. I cannot recollect, I don't know.
Q. You don't know whether you did or not?
A. No sir.
Q. Now when you went there this vacant bedroom through this vacant bedroom, Mr. Spaulding followed you down stairs?
A. Yes sir.
Q. And you went to the parlor and to Barrow's room?
A. Yes sir.
Q. You had looked down the hall and said there is a panel out of the door?
A. No sir.
Q. Before you unlocked the door?
A. Yes sir, before, while I was in there unlocking the door.
Q. When your attention was first called to the fact the panel was out of the door?
A. Yes sir.
Q. You were the first one discovered it?
A. Yes sir.
Q. You did not then unlock Barrow's door?
A. No sir.
Q. But turned immediately and went to the kitchen?
A. Yes sir.
Q. And there you found the panel out of the door?
A. Yes sir.
Q. Was the door locked?
A. I never tried it.

Q. You say things were generally torn up?
A. Yes sir.
Q. In that room and in the dining room?
A. Yes sir.
Q. At that time your suspicions were that a burglar had been there and had gone through the house?
A. Yes sir.
Q. Did Spaulding try to see if it was locked?
A. No sir.
Q. Did you examine the lock to see if it was interfered with in any manner?
A. No sir.
Q. Did you know it there was a lock or a bolt to that door?
A. I could not say, I thought there was a lock.
Q. On which side was the panel, inside or outside, the one which was cut out?
A. It was on the outside.
Q. Now after you had discovered this disarrangement of things generally you went back into Barrows part of the house?
A. Yes sir.
Q. And took the water bucket to water the flowers?
A. Yes sir.
Q. You and Spaulding were together?
A. Yes sir.
Q. Didn't go up stairs at all?
A. No sir.
Q. You considered watering the flowers of more importance at that time than making a thorough investigation?
A. I did—inside of Mrs. Baldwin's side of the house I had
19 nothing to do with it. I made the remark when we got through watering the flowers, Mary will be along after a while. I looked for her along every moment.
Q. Now you took the water bucket and you and Spaulding went on the outside did you together, off that porch where the screen lattice?
A. Yes sir.
Q. And you found the panel cut out of the door on the outside?
A. Yes sir.
Q. Picked it up?
A. Yes sir.
Q. What did you do with it?
A. Threw it up on the porch.
Q. Went back and watered the flowers?
A. Yes sir.
Q. After you had done that you went through the lower part of the house again, and Spaulding sat down at the piano to play a tune?
A. Yes sir.

Q. You had been thoroughly convinced the house had been burglarized?
A. Yes sir.
Q. Things down stairs?
A. Yes sir.
Q. Was this cake down stairs?
A. Yes sir, in a cake basket or box.
Q. What kind of furniture was there in the kitchen?
A. I did not notice anything further.
Q. What was there in the dining room?
A. Kind of a closet and drawers in it.
Q. Find these open?
A. Yes sir.
Q. Things generally upset around there?
A. Yes sir.
Q. What did you find in the parlor?
A. Looked as though it hadn't been touched at all, as though it had been fixed up.
Q. After he had attempted to play this tune on the piano you suggested to go up stairs?
A. I don't recollect, probably I did.
Q. Stopped to look at some books?
A. I stopped to look at a book on the centre table, it was Lessons in French; I said Mary was studying French.
Q. You were saying what the book was, he was playing on the piano, and both says the house had been burglarized?
A. He started to play on the piano.
Q. When you went up stairs what room did you first go to?
A. I went to the head of the stairs and noticed the tray there in the bed room.
Q. This bed room is the north bed room is it not, the little room you speak of?
A. Yes sir, he came up stairs.
Q. You looked into that room?
A. Yes sir.
Q. There is a bed in that room?
A. Yes sir.
Q. Where?
A. Right in this corner.
Q. On that bed you found what?
A. Tray of a trunk.
Q. Did you notice in that room a tray of a trunk?
A. No sir.
Q. Found the tray of the trunk on the bed?
A. Yes sir.
Q. You turned from that and went south here to the room where Mary was?
A. Yes sir.
Q. Found the door ajar?

A. Yes sir, half way open.

Q. Did you knock at the door?

A. No sir, I did not knock at the door?

Q. You did not knock and let it be known you were coming?

A. The door was open.

Q. How far?

A. About half way.

Q. Was it open so you could see the bed without looking round the door?

A. No sir, rather close stretch.

Q. After you saw her clothes on a chair you did not knock, or give any notice, but just peeped around the door, what did you expect to find by peeping around the door?

A. When I saw her clothes I expected to find somebody dead, sort of an unnatural feeling came over me.

Q. What made you suspect that way after you saw her clothes on a chair?

A. The house had been burglarized, I saw her clothes on a chair, I hardly know, a scare came over me.

Q. Badly scared?

A. Yes sir.

Q. Badly scared, did you put your hand on the door?

A. Yes sir, I think I did.

Q. Peeped right around the door?

A. Yes sir.

Q. Before you did that you fully expected to find somebody dead?

A. I cannot say, a cold feeling came over me.

Q. Spaulding look in?

A. Yes sir.

Q. Did he peep around too?

A. He looked around and saw her arm sticking out of the bed.

Q. How do you know?

A. He said he did, I saw him peeping in just stopped there a little bit.

Q. When you peeped around the door did you move the door?

A. I don't recollect I did.

Q. Did you look through the crack of the door?

A. No sir, no crack in the door.

Q. Where the door stood open, left an opening there where you could look through?

A. I did not look through that.

Q. You did not move that?

A. I don't recollect of moving the door.

Q. You peeped around and Spaulding peeped around and after that you said let us get out of here?

A. Before Spaulding peeped around I looked around first and jumped back, and he says "what is the matter?" I says, "My

God don't ask me, let's go and get somebody quick," and he kind of stooped over as I was going around the hallway.

Q. That was the only evening after Barrows went away that Spaulding was there with you?

A. Yes sir.

Q. Anybody there to assist you watering the flowers previous to that?

A. There was a friend of Charlie's up there one evening
21 and stayed with me, he lived home.

Q. They were left in your charge?

A. Yes sir.

Q. Previous to that you hadn't asked him to go there and assist in watering the flowers?

A. No sir, his mother was here on a visit and he devoted his evenings to his mother.

Q. When did his mother leave?

A. I could not say exactly, a day or two before.

Q. Did you ask him to go there on Tuesday to water the flowers?

A. I don't recollect of asking only on that day.

Q. His mother was out of the city Tuesday?

A. I think she was.

Q. You did not ask him on that day?

A. I don't think I did.

Q. The next day you went over there?

A. Yes sir.

Q. Been out late at night?

A. Yes sir, been out to a picnic.

Q. You wanted someone to assist you in watering?

A. Yes sir.

Q. What kind of a job was it to water those flowers, how much water did it take?

A. Generally used 7 or 8 buckets, had to carry the water out of the back yard into the front.

Q. After you discovered the house had been burglarized and the panel cut out of the door you went and carried 7 or 8 buckets of water before you investigated?

A. Yes sir, that is what we did.

(Mr. Gilbert.) You say the house was burglarized, you don't know anything about it.

A. No sir.

(Mr. Waggener.) Were you there on the 21st of May?

A. I don't know, had been in the habit of coming frequently.

Q. Do you remember the circumstance of that house being burglarized a few days before that?

A. Yes sir, I was there.

Q. What time did those parties who burglarized that house that night come in?

A. I did not notice. I never had anything to do with that part of the house at all.

Q. When did you first discover the house had been burglarized the first time?

A. When we came down in the morning, Mrs. Barrows met me at the door.

Q. Did they tell you how they got in then?

A. I think they said they came in through the screen door.

Q. I asked you if you had any information how those burglars got in there of your own knowledge?

A. No sir, I did not know as to how they got in there?

Q. Did you get information they came through the kitchen door?

A. I don't recollect about that.

Q. Did you go to see where they did get in?

A. No sir, I did not go to see where they got in, I heard Mrs. Baldwin say—

Q. Did you know of your own knowledge how much had been taken if anything?

A. No sir, I did not know of my own knowledge, only what I heard.

Q. It did not excite your curiosity enough to go and see
22 and investigate where they got in?

A. No sir, I did not have anything to do with that part of the house I never went into Mrs. Baldwin's part of the house except when I went to pay my room rent.

Q. How far was Barrow's dining room from Mrs. Baldwin's kitchen?

A. I guess just a partition, that is a hallway.

Q. This northeast room is Barrow's dining room and kitchen together?

A. Yes sir.

Q. This is Baldwin's kitchen?

A. Yes sir, I believe it is.

Q. That is the north room in the centre between the two?

A. Yes sir, that is the last room there is in the centre of the house.

REDIRECT EXAMINATION.

Q. You say you only suppose there was a burglary that night of the 8th.

A. (Objected to as leading.)

Q. Did you know there was a burglary there at all the evening of the 8th, when you went in there?

A. No sir, naturally supposed there was, the house was burglarized once before that.

Q. That is the only reason?

A. Yes sir.

Q. You did not miss anything did you in the evening?

A. No sir, I did not miss anything.

Q. About the house at all?

A. No sir.

Q. State whether or not you were disturbed any during the night of the 7th?

A. I have a faint recollection of a feeling coming over me during the night. I cannot tell what it was, I recollect plainly I turned over in bed, kind of uneasy and unusual for me, I usually sleep sound at night, especially any time I am out till 11 or 12 o'clock at night. I kind of turned over in bed, seemed to me it could not have been long after or before I went to bed.

Q. You went to bed at about 11 o'clock?

A Yes sir, about half past 11, between half past 11 and 12 o'clock.

Q. Did you hear anything that disturbed you?

A. No sir, I did not hear anything, I have a kind of faint recollection I turned over in bed.

Q. I want to ask you about the condition of the room where Mary Baldwin was found, what it anything did you notice on the floor, by the clothes on the inside, did you notice any pocket book?

A. No sir.

Q. When you went there the second time did you?

A. Yes sir, that is when I noticed it, I did not notice anything the first time except the pillow.

Q. What did you find on the floor the second time, if anything?

A. I did not find anything on the floor.

Q. Did you see this bottle?

A. I saw the bottle on the bed.

Q. One near the feet?

A. Yes sir.

Q. Was there a stopper in the bottle?

A. I could not say.

23 Q. Who took the bottle?

A. It was Talbot or Worden, some of them picked it up.

Q. Did you notice any other disarrangement in the room?

A. That is all I noticed. You asked me if I secured my door every night, I secured the outside hall door, it was always locked, since I lost the key of the other door I never locked the door of my bed room, it was latched.

Q. Did you lose the key of the outside door before or after Mrs. Baldwin went to Iowa?

A. Ater she went to Iowa.

Q. How long after?

24 A. I could not say, maybe Charlie could tell you.

Charles Spaulding, sworn, testified on behalf of the State as follows on direct examination:

* * * * * * * * * * *

Q. Whose room did you then enter?

A. Fitzgerald.

Q. What did you do then?

A. Staid there a couple of minutes and then we went to water the flowers, and came out of this door to the hallway, which was locked and came back this way and went through this door.

Q. Into where?

A. Into the hall, into this vacant room, through that door
25 into the down stairs, this is the hall here leads east in the hall, then we went to that door here, that is the door we had to open in the hall and we saw the reflection of the light through that panel, where it was out and we walked back into the kitchen.

Q. Toward the north of the house?

A. Yes sir, did not touch that door at all.

Q. What did you discover about the door when you got out near the door?

A. The panel was out and we looked at that.

Q. Now describe to the jury which way that door swung, which way it opened?

A. The hinges are on the east and the knob on the west, opens in the house.

Q. Towards the east?

A. Yes sir.

Q. Now go on and describe what you discovered about the door?

A. The panel was out and shavings lying on the floor.

Q. How far from where the door would be if the door was closed?

A. Must have been 18 inches was not up near the door.

Q. State whether or not on the door which would raise the door, above the level of the floor, under the door?

A. Strip just like that under most every door, raise the door up so it would clear the carpet, so when you opened the door it would swing over.

Q. Where did you go from there?

A. I think we came back and Fitzgerald says everything is all right in the Barrows part of the house, and came back over here through this door, in the hall and unlocked this door through Barrow's parlor, and through this door and through the kitchen, dining room and through that door, on the little porch and got our watering cans, and then came out of this door down to the well and got the water and then came around the house and watered the flowers, and up around here.

Q. Bay window here?

A. Yes sir.

Q. Now describe the bay window while there how does it stand in reference to the house, is it under the room above, Mary Baldwin's room?

A. Yes sir.

Q. How near does it approach to the door above?

A. Not over three feet.

Q. State whether or not a person could step from the top into her room?

A. Yes sir.

Q. How near is the window from her room out over the bay window?

A. I think it is directly above.

Q. I say how far from the top of that bay window is it to the window?

A. It is not over three feet it may not be so much.

Q. Could a person get up that way and get into her room?

A. Yes sir, the flowers were round this bay window, under this bay window, under it, and then there is flowers put out here, and we watered those flowers, I think there was some out here.

Q. On the north of the house?

A. Yes sir, then we took a survey of the house, I merely remarked to Fitzgerald, we would take a survey of the house, and he said yes, and we brought the water can back.

Q. And entered the back door you went out at?

A. Yes sir.

Q. Into this latfice porch?

A. Yes sir, and then we went out into Barrow's kitchen, through the parlor and through the hallway, and into Baldwin's part into this kitchen, and into this dining room.

Q. That is off to the west of the kitchen?

26 A. Yes sir.

Q. What did you discover in either of these rooms?

A. This table had several drawers in pulled out, and the cake box on the top of the table, in this room there is a closet here, the door was open and I noticed some clothes of some kind, I don't know whether table cloths or what they were, and went on in the parlor, and Fitzgerald happened to look back there, I was just sitting or going to sit down to the piano, on the piano stool, and he walked out and I followed him, and he went through that door into the dining room, and into the kitchen and out through the hall and up the stairs.

Q. Where did you go up stairs?

A. Looked into that door saw the tray of the trunk on that bed there and then came through this way into Mary Baldwin's bed room?

Q. Did you approach the bed room?

A. Yes sir, Fitzgerald looked round there.

Q. How did you find the door standing when you approached the bed room?

A. Half way open.

Q. What did you discover?

A. Her clothes were on a chair and Fitzgerald looked around and jumped back, and says, "By God let's get out of here and get somebody to come here;" I says, "What is the matter with you is she dead?" and he says, "I don't know, don't ask

29 me I just saw her arm."

Q. Did you leave everything just as you found it there?

A. Yes sir, Worden opened the shutter.

Q. What shutter did he open?
A. The east shutter, the shutter on the east.
Q. Now describe about the shutter to the window, how many windows to that room of Mary Baldwin's?
A. Two windows I think.
Q. Which way were they?
A. One was near the south.
Q. How were they fixed have shutters to them?
A. Yes sir.
Q. Where is the bay window in reference to the windows?
A. I think it is directly under the south window.
Q. Which one of the shutters did he open?
A. He opened the east shutter.
Q. Threw them open?
A. Yes sir.
Q. Were they closed before they did that?
A. Yes sir.
Q. Were the other shutters closed?
A. Yes sir, all the shutters in the room were closed.
Q. Were the windows up or down?
A. Up.
Q. Windows both up?
A. Yes sir.
Q. Were you in that room when the defendant came to that room?
A. I think I was.
Q. Did you see him when he first came in there?
A. Yes sir, I think I did.
Q. Do you know what he said?
A. He asked somebody what was the matter and somebody told him his sister was dead and for him to come up stairs he looked over the foot of the bed and says, "Is that my sister can it be my sister?"
Q. Was that about all he said?
A. No sir, I guess he said more than that, he was standing at the foot of the bed, then he walked round at the side of the bed and I saw him kneel down by the side of the bed.
Q. State whether or not you saw him shed any tears there, when he was at the foot of the bed?
A. I don't think he shed any tears.

* * * * * * * *

Q. You say you saw this door cut into on the north side, what was cut out of the door?
A. Panel.
Q. What panel was it with reference to the door knob, next to it?
A. Yes sir, the bottom.
Q. The bottom panel next to the door knob?
A. Yes sir.

Q. Where was the panel?
A. On the outside on the grass.
Q. What did you do with it if anything?
A. Fitzgerald picked it up and threw it on the porch.
31 Q. Do you know what Mr. Baldwin's business is how long have you been intimately acquainted with him?
A. I never was intimately acquainted with him I saw him at Mrs. Barrow's I think I am not positive I heard he was a carpenter by profession or learning the carpenter trade.
Q. Do you know whether or not he lived at that house the place you described there on the corner of Commercial and 11 street.?
A. He never has since I have been there.
Q. Did he before?
A. Yes sir, I think he did.
Q. You say that you roomed there with the Barrows there didn't you?
A. No sir, I boarded with the Barrows.
Q. In this same house?
A. Yes sir.
Q. When was it you came there?
A. Before last Christmas along last December some time.
Q. Had Baldwin lived there since you came?
A. No sir, I don't think he had.
Q. When was it prior to that he had lived in that house?
A. I don't know before he was married I think.
32 Q. Who was occupying the house along about July 7th or 8th last?
A. No one but Mary Baldwin and Mr. Fitzgerald that I know of.
Q. No one that you know of except just Fitzgerald and Mary?
A. Yes sir.
Q. Did you see Mary Baldwin during the day of July 7th?
A. I saw her in the evening about half past eight I should think there about Weston's grocery store she was passing there.

* * * * * * * *

CROSS EXAMINATION.

Q. Mr. Spaulding previous to July 8th had you assisted Fitzgerald in watering the flowers?
A. No sir.
Q. What time did your mother leave the city?
A. In the evening at six o'clock.
Q. Had you stayed all night there with Fitzgerald any night?
A. No sir.
Q. Ever sleep in the house?
A. Not after Barrows went in.
Q. Previous to this?

A. No sir.

33

* * * * * * * *

Q. Now on Wednesday evening about what time was it you went on those premises?

A. About seven o'clock along about that time.

Q. Was the sun down then?

A. No sir, I don't think it was.

Q. You went up stairs into Fitzgerald's room and through this other bed room down stairs?

A. Yes sir, tried to get through the hall.

Q. Found it locked?

A. Yes sir.

Q. As you went down stairs you went into the main hall up stairs?

A. Yes sir.

Q. Came out of that bed room into the hall?

A. Yes sir.

Q. How near to Mary Baldwin's bed room did you pass as you went up stairs?

A. I could have touched it easily.

Q. Did you notice it was open?

A. No sir.

Q. Did you notice whether the door at the head of the stairs leading into the north bed room, where you found the tray of the trunk was open or not?

A. I don't believe I did then.

Q. You walked right to that as you went to the head of the stairs you would be facing it?

A. No sir, not exactly except I should be facing it I might have noticed it open I did not pay any attention to it.

Q. Don't remember now you did?

A. No sir.

Q. When you came down stairs into the main hall you discovered the reflection of the light from the panel out of the door?

A. Yes sir.

Q. You immediately went into the kitchen?

A. Yes sir.

Q. Did you attempt to see whether it was locked or unlocked?

A. No sir, I did not touch the door.

Q. Don't know whether it was locked or not?

A. No sir.

Q. Did you subsequently ascertain the door was locked or not?

A. No sir, I never touched the door.

Q. When you got in the kitchen you found things disarranged?

A. Yes sir.

Q. You then got the water bucket and went out and watered the flowers and went around in Barrow's part?

A. We went around in Barrow's part and got the water buckets and watered the flowers.

Q. After you watered the flowers you came back and
34 went into the dining room into Baldwin's part?

A. Yes sir.

Q. And there found things pulled around and things disarranged generally?

A. Yes sir.

Q. Where did you go then?

A. Into the parlor.

Q. What parlor, here is the parlor?

A. This is Mrs. Baldwin's parlor.

Q. Find any disarrangement there?

A. No sir.

Q. What was in that room?

A. Piano and centre table with some books on it and chairs, about all I noticed.

Q. Any bureau or closet of any kind?

A I did not notice any there might have been.

Q. After that you went up stairs?

A. Yes sir.

Q. And found the tray of the trunk on the bed, north side, what was the contents of that tray?

A. I never noticed.

Q. Did you look into it?

A. Something in it I did not notice what it was.

Q. After you had gone into the parlor and returned then to Mary Baldwin's bed room did you make any examination there?

A. No sir.

Q. Did you know where the key of the door was?

A. No sir.

Q. Did you know whether there was a lamp in the room or not?

A. No sir.

Q. In your investigation there did you find a lighted lamp in any part of the house?

A. No sir. not a lighted lamp?

Q. Did you find any lamp on any table or lamp in the kitchen or dining room?

A. I don't remember now.

Q. Don't remember you did?

A. No sir.

Q. Did you find any pocket book or hand satchel on the floor in Mary Baldwin's room?

A. No sir.

Q. When you went back there with those parties did anyone get behind the bed?

A. I did not see anybody go behind the bed.

Q. You did not yourself?

A. No sir.

Q. When you went into the room you are satisfied the window blinds the shutters were closed?

A. Yes sir.

Q. They were opened by Worden?

A. Yes sir.

Q. Who were the parties in the room at the time that Worden opened the blinds?

A. Talbot and Lockton and myself, I was down stairs, I had been there for some time, I think Benning was there, was quite a crowd on the sidewalk.

Q. You first saw the defendant down stairs, who did he come with?

A. He came alone.

Q. Did he come immediately up stairs?

A. I think he did.

Q. Was Benning with him when he went up stairs?

35 A. I did not notice that.

Q. He went up stairs at the same or about the same time you did?

A. No sir, I went up stairs after him.

Q. And did you follow him up stairs?

A. I don't know that I followed him directly. I went up to the top of the stairs I think?

Q. Were you there as soon as he was?

A. Might have been the same time. Yes sir, I was there when he was there.

Q. When you first saw him in the room who was in the room beside the defendant Baldwin?

A. I think Talbot was and Lockton and Benning.

Q. You say that Baldwin said is that my sister?

A. Yes sir, and then went and knelt down beside her.

A. Yes sir, beside the bed.

Q. How long did he remain in that position?

A. Might have been a minute or two minutes.

Q. While he was kneeling there beside the bed who was in the room?

A. I think Lockton, Talbot and myself.

Q. Any ladies there?

A. I don't know.

Q. Did you leave the room while he was kneeling there beside the bed?

A. I don't remember I don't think I did.

Q. What is your best impression you did or did not?

A. I don't think I did.

Q. He got up from a kneeling position while you were in the room?

A. Yes sir, I think he did.

Q. Then where did he go?

A. I think he left the room then presently, I think Benning brought him down.

Q. How do you mean bringing him down?

A. Escorted him down the stairs.

Q. Do you know where Baldwin went then?

A. He came down stairs and stood at the front of the stairs a few minutes and Fitzgerald supported him there and took him into Barrow's department.

Q. Did he seem depressed at that time?

A. Yes sir.

Q. He seemed so much so you and Fitzgerald supported him?

A. Yes sir.

Q. You took him in Barrow's department of the house?

A. Yes sir.

John Lockton, sworn, testified for State on direct examination.

* * * * * * * *

39 Q. How long have you been acquainted with the defendant?

A. Never been intimately acquainted with him, have known him for perhaps two years.

Q. In what business has he been?

A. Only as I have been informed—I understood he was a carpenter.

Q. Do you know where he has been living?

A. Atchison street, I believe.

Q. Where was he living if you know on the 8th day of July 1885?

A. Living on Atchison street.

Q. What other street?

A. I don't know.

Q. You don't remember?

A. No sir.

Q. Do you remember between which streets?

A. I do not.

Q. Was he living there with his wife?

A. I believe so.

Q. Do you know how far that is from the Baldwin house where he was living?

A. Three or four blocks.

Q. Which way?

A. North.

Q. Do you know who was occupying the Baldwin house where you found this girl along about the 6 or 7 or 8th of July?

A. I think the house was not occupied by anyone at that
40 time except Mary Baldwin and Fitzgerald.

A. M. Worden, sworn, testified on behalf of the State as follows, on direct examination:

* * * * * * * *

Q. Did you see the defendant Baldwin enter the room?

A. Yes sir.

Q. Describe to the jury how it was?

A. I went outside and made inquiries where he lived, and was going after him, and some one said he is coming now, coming down 11th street from where he lived and so when he came he wanted to know what was the matter, and there was one of the young ladies said Mary was dead. He says, "Is that so?" and started to go up stairs and we followed him right up and went in the room. He says, "My God is that Mary?" and I don't know as there was any reply made to that or not, and he says, "She is not dead she cannot be" and then there was some conversation passed between others, I don't know as he joined in the conversation at all.

Q. What was his appearance there at that time?

Objected to by defendant.

Q. Give his actions?

A. He acted very indifferently, I thought, for a brother in a case of that kind.

44 (Mr. Waggener): I ask the court to strike that out.

(By the Court): Gentlemen of the jury, you need not consider that answer.

Q. Give only his appearance and what he said and where he stood?

A. I could not tell all he said, I do not know just all that did pass between us, so much excitement going on.

Q. Where did he stand?

A. Beside her near the bed.

Q. State whether or not he shed any tears or not at that time?

A. Yes sir, he shed tears.

Q. What was his appearance after that, you did not go out with him?

A. I did not go out with him, he was sitting outside in a chair, he was looking around at the persons who were there, then he would put his head down and seem to be shedding tears and he asked one of the ladies who was there to cry for him, he said he could not cry.

* * * * * * * *

Q. Did you go back and examine that door?

A. No sir, not until after a couple of hours.

Q. When you went there what did you discover about the door?

A. One of the lower panels was cut out of the door,

46 sawed out, I could not say where.

Mrs. H. V. Farries, sworn, testified on behalf of the State as follows, on direct examination:

Q. Where do you live?

A. 1001 Kansas avenue Atchison Kansas.

Q. How long have you lived here?

A. 4 years.

Q. Are you acquainted with the deceased Mary Baldwin, were you?
A. I was.
Q. How long had you been acquainted with her?
A. About 3 years.
Q. Did you know where she lived prior to her death?
A. Yes sir, on the corner of 11th and Commercial streets.
47 Q. How long had she lived there?
A. Ever since I knew her.
Q. Who lived there with her?
A. Her mother Mrs. Baldwin.
Q. Who else?
A. Her father before he died and part of the time her brother Will.
Q. The defendant here in this case?
A. Yes sir.
Q. How long did Will Baldwin live there with Mary before her death?
A. Until he was married.
Q. About what time was that?
A. November 1884.
Q. Then you say he had lived there at that house there all the time he was a boy up until that time?
A. I don't know whether he lived in that house from the time he was born until that time, from the time I knew him until he was married that was his home.
Q. About how long was that you know of his being there?
A. About 3 years.
Q. He lived there with his father and mother?
A. Yes sir.
Q. Where has he lived since his marriage?
A. In Mr. Starr's house on Santa Fe street.
Q. Whereabout is the Baldwin house you speak of?
A. The first or second house from the corner. It is the second house from the corner of 10th street, on the south side of the street facing north.
Q. How far is that then, how many blocks?
A. Three blocks and a half.
Q. How long did he live there do you know?
A. From the time he was married until Mary's death.
Q. Do you know where Mrs. Baldwin was prior to Mary's death awhile?
A. She was in Bloomfield Iowa Medical Infirmary to be treated, E. J. Sheldon.
Q. Bloomfield Iowa?
A. Yes sir.
Q. When did she go there about?
A. I would not be positive about the exact length of time, about 2 weeks or 3 before Mary died.

Q. When did she return?
A. The day after Mary found dead.
Q. Then she was gone when or while Mary died?
A. Yes sir, she was.
Q. Do you know where Will Baldwin was on the 7th day of July?
A. No sir, I did not see him.
Q. You did not see him that day?
A. No sir.
Q. See him on the 8th day of July?
A. I did.
Q. Where did you see him?
A. On the street.
Q. What time of day?
A. I could not tell you I don't remember.
Q. About what time in the morning or the afternoon?
A. I think in the morning.
Q. Now were you at Baldwin's house on the corner of 11th and Commercial street on the evening of the 8th of July?
A. I was I went there 10 minutes before 7 o'clock.
Q. Ten minutes before 7 o'clock?
A. Yes sir.
Q. How did you enter the house?
48 A. On the west side into the back door?
Q. Whose room?
A. Mrs. Baldwin's kitchen into the kitchen.
Q. Then you entered the house from the north into the kitchen?
A. Yes sir, from the north door into the kitchen.
Q. What did you discover about the door when you entered it?
A. I saw the panel had been sawed out of the door, and saw shavings lying on the floor and sawdust.

* * * * * * * *

Q. Did you discover anything on the floor as you entered? any chips or anything?
A. I saw chips and sawdust, I went quickly and did not stop to examine.
Q. You think inside of the house?
A. Yes sir, some lying on the floor just as I entered the door. On the door sill and on the floor as I entered.
Q. On the floor in the house?
A. Yes sir.
Q. Did you see the panel?
A. Yes sir.

* * * * * * * *

Q. Before you describe the room did you go through the lower part of the house, through the rooms in that house that evening?
A. No sir.

Q. Any time that evening?

A. I did probably in an hour from the time I entered the house.

Q. State how the appearance into the other rooms
49 as to the appearance of any breaking to them or anything?

A. Shall I commence with the kitchen? The cupboard doors were standing open.

Q. First the door into each room, door of house or room?

A. First the panel was removed.

Q. I say describe as to the condition of the other doors in the house into each room as to whether there was any appearance of any one breaking into them?

A. No sir, no appearance at all that I could see.

Q. Now then whether any appearance of any burglars?

Objected to by defendant. Sustained.

Q. What was the appearance of things in the house? below in the different rooms in the back parlor bureau drawers?

A. In the back parlor the bureau drawers was open and cloth lying on the floor I did not examine it at that time I just saw it and passed it by. The cupboard door was open in the kitchen that was all except the parlor door.

Q. That is all the disturbance you saw?

A. Yes sir.

Q. Now to Mary's room I wish you would just describe in your own language the appearance of Mary's room the appearance of everything in that room which you saw about it?

A. As I entered her room I saw she was lying diagonally across the bed her head was from 15 to 18 inches I would not be positive about that from the head of the bed her feet was towards the southwest, northwest—her head was toward the southeast and her left hand was lying out this way probably at an angle of 35 or 45 degrees and the left hand—

Q. Did you mean the right hand, you said the left?

A. The right hand was at an angle of 45 degrees out this way. The left hand was either below or above I am not certain about that. Her gown was pushed over her shoulder here and her left breast was exposed. Her head was turned on the left side like and nose a flattened appearance. There was mucus running out of the mouth and a pillow was lying over her face spot on the pillow with the mucus on the mouth and as large as my hand and her gown was smooth to her ankles and her hair was done up in crimps on her forehead here at the right hand was five hairpins just strewn around on the bed her hair it had been coiled the coil was out of her hair on her neck, her hair remaining on her neck, in a mat like that, and the sheet was gathered up and thrown up on the side of the bed on the back side of the bed, the bed was about 18 inches from the wall at the foot about as a person would put their foot against the wall to push it out her feet were near the side of the bed near the foot and then the sheet and spread were gathered up with the hand and thrown up on the side of the bed not very far more than

a foot on the bed and towards the head of the bed. Pillow stood on end.

Q. Which side of the bed?

A. On the back side of the bed that way leaning against the bed.

Q. Did you discover anything else on the bed?

A. On the floor behind the bed was two cloths one was a little longer than the other it was white muslin perfectly plain and apparently dropped down there and another cloth was older similarly had been wet with something just in that shape and on examination it was the sleeve of a ladies undershirt that had been wet but was perfectly dry at that time.

Q. Where did you find that cloth?

A. On the back side of the bed on the floor near the foot of the bed.

Q. Did you discover any other cloths?

A. Only those two.

Q. What did you discover on the bed opposite the pillow?

A. On the bed under her right leg under the calf of her right leg was a bottle about 4 inches long lying under the calf of her right leg?

Q. Was the cork in or out of that bottle?

A. Out.

Q. Which end of the bottle was under the leg?

A. The mouth of the bottle.

Q. Did you notice the bottle particularly?

A. I did when Dr. Sheppard took it out from under her leg?

Q. Did you see him take it out?

A. Yes sir.

Q. Would you recognize the bottle?

A. I think I could?

Q. Look at that and see if you recognize that as being the same bottle?

A. I will tell you what was on the bottle as he took it out from there "Poi" and then right under that was "Ma."

Q. Examine that and see if you think that it is the same bottle?

A. It has been scratched. Part of it is gone.

Q. What is gone?

A. I can't say anything and the top of this has been scratched off.

D. Do you know whether this is it or not?

A. I am positive it is because that writing was on it.

Q. Did you see this writing here?

A. Yes sir, but that is not "Poi" and then "Ma."

Q. Was that the kind of a bottle it was?

A. Yes sir, that looks like the bottle.

Q. Wasn't the writing on the upper part of the bottle blank?

A. "Poi" came first up here, then "ma" down there.

Q. You say Dr. Shephard picked it up and handed it to you?

A. I called his attention to it; I said, "Dr., did you see that

bottle?" and he took it up and looked at it and put it in his breast pocket.

Q. He picked it up and put it in his breast pocket?

A. Yes sir.

Q. Now you may go on and state what condition that room was in.

A. The head of the bed was toward the south. After I entered the door right behind the door, stood a sewing machine, and on top of that sewing machine was the tray of a trunk, and in that tray was Mary's articles, such as she wears around her neck, things that she had just laid in there, I could see her gold chain and locket. I never moved them never mislaid them, then came the bed as I have already described, and the south side of the room coming to the south window the blind of that window was closed the window was up and then came the table, and on that table laid Mary's false frizzes that she wears on the head, then came the wash zinc, drawer was open, in that drawer was just hairpins, and her comb and brush, her face powder and nothing had been disturbed. The wash bowl was on the wash zinc, the doors below were open, then came the table, this window on the east side was open, and the blinds were thrown open, then the table stood there by the window, the drawer was open and in that drawer Mary had a note book and a box just as she left it, nothing had been disturbed at all, and at the end of that table stood a large black stucco chair, on that chair was lying two square pillows, on
51 these square pillows Mary's satin dress, she wore the day before was lying on one of these chairs, right at the side of the pillows on the floor lay her pocket book, and then came the portable wardrobe, the wardrobe doors were open and her dresses were hanging nicely with the exception on the north side of the wardrobe three garments were thrown down and laid right on the floor by the door, as though they had been taken down off from the hooks and thrown down. One drawer of the wardrobe was open and in that lay articles of underwear, all smoothly put in and had not been disturbed, that is to be mussed up or anything, they were all smooth, and then came the door to the wardrobe in the house, in that wardrobe a small wash zinc about four feet, the lower drawer of that was open, pulled out, and all the articles in that drawer were taken out on the floor, and along other articles, was a box not less than six inches long, and not over eight inches, about four or five inches tall over the top, as though it might have been a box of papers. Her pocket book and hand satchel or hand pocket book, was lying there on the floor open, and nothing in it, her shoes and stockings and elastics lying opposite the stove, and her stocking had the appearance as though she took her hand and shoved the stocking down and took it off. Then we get around to the door where we started.

Q. Now what did you see in the drawer drawn out anything

valuable in the little bureau stood on the south near the head of the bed?

A. Nothing in the drawer at the time but on the floor was lying simply this pocket book and a little hand satchel and this paper box and a few other articles. * * * *

52 Q. How long did you stay there that night?

A. It was half past one when my husband went home with me.

Q. Do you know where Will was the defendant there?

A. He was there all the time I could not tell you where he was after half past ten I went home I asked him for some articles that I would want for Mary, he said he did not know anything about where to find them I asked Marshal Price to hold the lamp while I looked for them. After that I did not see him until the following morning.

Q. Did he assist in any way, about there, in assisting about matters there that night?

A. No sir, not that night.

Q. When did you see him again?

A. The next morning at 8 o'clock.

Q. What was his appearance then?

A. He seemed to be distressed and seemed to be anxious to have some one to come and to take care of the house and superintend the house. I told him he had better leave it to the ladies. * *

Q. Do you know how old Mary Baldwin was?

A. Only what her mother told me.

Q. What did she tell you?

A. 29 years old.

Q. Do you know how old her mother is?

A. No sir.

Q. Ever hear her say?

A. I have forgotten it.

Q. Do you know how old the defendant is?

A. I have heard his age. Would not be positive about it.

Q. You would not be positive about it?

A. No sir.

Q. Mary was older than he?

A. Yes sir.

Q. Do you know anything about their relations to each other whether they were friendly to each other as to whether he was friendly to her or not?

A. I never heard him say a bad word to Mary in my

56 presence at all. * * * * * * *

Q. So you have described now everything that was in that room?

A. I think I have.

Q. Did you open the bureau drawers?

A. No sir they stood open.

Q. Did you pick up her pocket book?

57 A. No sir.
Q. How did you know it was empty?
A. It was lying open on the floor.
Q. Pick up her hand satchel?
A. No sir.
Q Was that lying open also?
A. Yes sir.
Q. Anything in that?
A. I think not.
Q. Where was this pocket book?
A. It was by the wardrobe down on the floor.
Q. Which side of the room?
A. On the north side of the room.
Q. Where was the hand satchel?
A. Laid right beside the pocket book.
58 Q. As you went through the kitchen door you discovered sawdust on the floor?
A. I did.
Q. Positive it was sawdust?
A. Yes sir, quite positive.
Q. So you are satisfied that a saw had been used there?
A. It looked to me like it.
Q. Did you make a particular examination of that to see if it was sawdust?
A. No sir.
Q. It was light enough for you to see, so you can say on your oath it was sawdust?
A. Yes sir, I could. * * * * * *
60 Q. How far from the sill of the door was there shavings and sawdust on the inside?
A. On the inside not more than four inches from the sill.
Q. So that they might be pushed in by opening the door?
A. No sir, I should think not; the door would swing over them.
Q. Did you examine to see how far the door came from the floor?
A. No sir. * * * * * *
61 Dr. Campbell sworn, testified on behalf of the State on direct examination:
Q. Where do you reside?
A. Atchison, Kansas.
Q. How long have you lived here?
A. Over six years.
Q. What is your business?
A. Physician and surgeon.
Q. How long have you been physician and surgeon?
A. About 12 years and over.
Q. State whether you are one of the physicians who attended the post mortem examination of Mary Baldwin?
A. Yes sir.

Q. Now go on and state where you found her and what condition you found her in?

62 A. I found her up stairs in the Baldwin house, on the corner of Eleventh and Commercial street, lying in the southeast room; the bed was moved out from the wall a foot out from the wall; the head was at about in its natural position, probably drawn out a little; Mary was lying diagonally across the bed, her head towards the southeast and her feet towards the northwest and she was probably a foot or over down from the head board, her head near the right side of the bed as she lay, and her feet pointing toward the other corner, that is the northwest corner, lying on her back and her head turned towards the left—quite remarkably that side. The right arm was thrown off easily from the body, a short distance about an angle of forty-five degrees, and her left on the other side.

Q. Now what time of the evening was it you saw her, the evening of that day was it, and when was it?

A. 8th of July, as I here testified to that as the time, about half past 7 o'clock in the evening.

Q. In this County and State was it?

A. Yes sir, corner of Commercial and Eleventh street. * * *

Q. Did you see the bottle that was there at that time?

65 A. Yes sir.

Q. Will you describe to the jury as well as you can about the appearance of that bottle?

A. It was a clear reddish glass bottle, probably three or four inches long, and probably inch and a half one way by an inch thick or three fourths of an inch thick; flattened bottle with the edges beveled.

Q. Did it have part of a label on it?

A. Yes sir, it did.

Q. Will you describe near as you can about the kind of a label which was on the bottle?

A. There was just a portion of the label left on it. I should judge from what I saw of the label, it was about three-fourths of an inch wide, and perhaps two inches, or two and a half inches long. Upon the upper part of the label was two three pen marks or strokes; one was a stroke which came down below certain lines, the other was the termination like two-thirds of the termination of the letter m, and to the left of that was this deeper stroke so much corresponded with what I made up my mind then was the termination of a portion of the letter f or a portion of the letter M was torn off of the letter F or a portion of the letter M was torn off a portion of the letter f and letter "M" "A" was on the bottle, and below that was the letter "oi" and "on" in print.

Q. In writing or print?

A. Print; and the letters p s were torn off "on" and "oi" were there with the space between the letters for the letter "s," corres-

ponded in my judgment to the word poison, I could not make out the word poison.

Q. You could not make it out?

A. Four letters left there near as I recollect now.

Q. What letters if any, did you see in the word poison
66 under the word poison?

A. I think some printed letters "po" something of that kind, I have forgotten some of the letters under that.

Q. Was it "ma?"

A. Something of that kind under this poison. My attention was not directed to that to determine as to make out if I could the probable contents of the bottle.

Q. What in your opinion was the contents of that bottle from your examination?

A. I decided from what I saw was left of the termination of the letter "M A" the word chloroform. I have seen just the same kind of labels with a space left at the top of the label.

Q. It was what you call a blank label?

A. Yes sir, whatever article was to be written with a pen.

Q. Would you know the bottle if you saw it do you think?

A. Yes sir, I think I would.

Q. Examine that bottle and see if you think that is the bottle with the label?

A. Yes sir, I think that is the bottle. One exactly like that without doubt.

Q. Is not the description of the label you have just given.

A. Yes sir.

Q. Have you ever seen that bottle since the time that night you saw it?

A. No sir.

Q. That you say is the same bottle you saw there?

A. Yes sir, that is the same bottle I recollect seeing there, exactly one like it. It looks a little bit more worn than it was then; but it looks to be the same bottle.

Q. Is not some fragment of the word chloroform on it you have just described?

A. Yes sir.

Q. Branch of the letter "F" below points over the letter "S" and the last part of the letter "M"?

A. Yes sir.

Q. That is on the blank above as you have described?

A. Yes sir.

Q. Then the word poison is partly scratched as you describe it is it not?

A. Yes sir, the "I" is indistinct and "S."

Q. It is the same letters on there "M"?

A. They are there. Yes sir. I recollect them; I remember some of the letters being at the bottom here, my attention was called especially.

Q. You stated a while ago you thought it was "MA," that is the same set of letters there?
A. Yes sir.

* * * * * * * *

Charles W. Benning sworn, testified on behalf of the
78 State as follows:

* * * * * * * *

Q. State whether or not you were at the Baldwin house at that time on the evening of the 8th of July?
A. Yes sir.
Q. Eleventh and Commercial?
A. Yes sir, I was.

* * * * * * * *

Q. What did you discover—you say you discovered a bottle?
A. Just under the calf of the leg.
Q. Which leg?
A. The right one, I think.
Q. Did you take hold of the bottle and pick it up?
A. Yes sir, I did.

* * * * * * * *

80 *Cross-Examination:*

Q. Where did you first see Will Baldwin?
A. Coming up the stairway.

* * * * * * * *

Q. Did you go up the stairway together?
A. Yes sir, we did.

* * * * * * * *

Q. You and Mr. Baldwin went in together?
A. Yes sir.
Q. State what he did there?
A. Well, he cried out, "Is she dead? is she dead?" Asked me that at the foot of the stairs, and kept saying it as we passed on up stairs.
Q. What was his appearance as to being depressed or otherwise?
A. He seemed to be excited and agitated.
Q. He went right up stairs with you?
A. Yes sir.
Q. Afterward, did he leave the room before you did?
A. No sir.
Q. How long after he left before you saw him again?
A. I did not leave; I took him out of the room with me?
Q. How came you to take him out?

A. He seemed to be excited and worried. I thought it was no place for him.

Q. You took him down stairs?

A. Yes sir.

Q. Do you know of his going back after that?

A. Yes sir, he went back again.

Q. Who went with him?

A. I don't remember.

Q. Was he brought out of the room the second time?

A. Yes sir, I did, the second time.

* * * * * * * *

88 Albert H. Lewis sworn, testified on behalf of the State as follows:

Direct Examination:

Q. Where do you reside?

A. I believe in California. I have been living here the last two years.

Q. State whether or not you were acquainted with Mary Baldwin who is now dead?

A. I was.

89 Q. State what intimate acquaintance you had with her then?

A. I was engaged to her to be married.

Q. When did that engagement begin?

A. It began about September, I think, 1884.

Q. Were you engaged to be married to her at the time of her death?

A. I was.

Q. State now what your relations were, whether congenial, the engagement relation? Congenial and happy.

A. Were happy.

Q. Anything else but happy?

A. No sir.

Q. When were you to be married?

A. We were talking about being married in September; decided to be married about that time. The last talk I had with her we had about decided we would be married in the past September.

* * * * * * * *

93 Q. State if you know of him being pressed for money when he came back, whether he was out of money, and whether he had to borrow money?

A. He came to me one day, and told me his mother was to send him $500 on this purchase of the homestead; and that he had to have $210 that day, to pay his workmen; and he asked me if I would loan it to him. He would give me a check for it, or pay it to me as soon as he got the money from his mother. I told him

as he got to have $210, that perhaps it would be better for me to let him have $250, then he could, it his mother did not send him the balance, I would let him have the other $250. I gave him a check on the bank for $250, on the purchase that. He said that his mother was going to send him $500 on the purchase towards the homestead.

Q. On the purchase of his interest?

A. Yes sir.

Q. When was that?

A. I don't remember. But while his mother was absent in Bloomfield, Iowa. She started away after the 26th. I believe it was, may have been three or four days, or five days.

Q. After he had been to California?

A. Yes sir.

Q. How long was he out in California, away from here on that trip?

A. I understood he was away six weeks.

* * * * * * * *

94 Q. What appeared to be his necessity then for immediate use of the money?

A. He said he had to have it, to pay his workmen; that day.

Q. Did he ever ask you for money before or after that, or borrow from you?

A. No sir. He gave me his note, payable in 30 days. I never charged him any interest, just did it as an accommodation.

* * * * * * * *

96½ Q. Where did you see Mary last, and when?

A. I saw her 9:45, or about, Tuesday, 7th of July, in the evening.

Q. Where did you first see her that day?

A. At her home, about 8:30 that evening, the same evening.

Q. About 8:30 that evening, found her at home?

A. Yes sir.

Q. Now then, where did you did you take her, anywhere?

A. I took her to Poehler's restaurant.

Q. Here in the city?

A. Yes sir.

97 Q. How long were you there?

A. We went from there at 8:30, and went immediately down there, and it would be pretty hard to tell exactly how long we were there.

Q. Approximate.

A. The only way I can judge how long we were there, was gone, was by the time I got home, 10 o'clock precisely. Just as the clock was striking 10 I went into the door.

Q. Now were you at the ice cream saloon, what did you do there?

A. I left there about fifteen minutes to ten, may have been 10.

Q. What did you do at the ice cream saloon?
A. Got some ice cream.
Q. She took ice cream with you?
A. Yes sir.
Q. What was her state of health at that time?
A. She seemed to be well.
Q. Did she complain in any way at all; of ill health?
A. No sir. I think she had not been feeling very well. I know she had not, for several days. She did not make any remark about ill health. She appeared well.
Q. Did she have a good appetite at that time, as far as you know?
A. She ate ice cream.
Q. Did she say anything to you about appetite, about eating meals regularly?
A. No. She proposed going for the ice cream, that is when she left, just before. If you will allow me, I will tell you just how the whole thing came up.
Q. Did she appear to you to be a person in good health?
A. Yes sir.
Q. Now then when you left the ice cream saloon, where did you go with her?
A. Home with her. Number 1101 Commercial street.
Q. What is the other street?
A. Corner of Eleventh street.
Q. Now then, about what time did you get there?
A. Probably 9:25. I think I was there probably half an hour, about, maybe 20 minutes.
Q. Where did you leave her; in the parlor?
A. When I left the house? No sir. I left her we went into the house parlor, and then she came out to the door and bid me good night.
Q. You left her at the door?
A. Yes sir.
Q. Now when you left her there, what did she say. Was she in a cheerful disposition?
A. Yes sir, she seemed to be in good spirits, bid me good night.
Q. Was there anything in her appearance there which led you to believe she was in grief or dissatisfied? Was there anything that way with her situation?
Objected to by the defendant as irrelevant, incompetent, and immaterial. Overruled. Defendant excepting.
A. No sir, not at that time.
Q. Not anything you saw?
A. No sir, not when I left her, she seemed to be happy.
Q. During any time you were there at all?
A. I don't know as she expressed any, I don't know as she expressed any grief or trouble. She spoke to me about our marriage. She thought we had better be married before they made the trip to California. Her mother was in the Infirmary, and she

did not think it best for us to be separated. We had better be married and go and make a visit to my friends, who invited me, and said they expected we would be there, before this. She talked
98 about it that evening, and said she had several reasons for desiring it should be so, as she also proposed on several occasions before.

Q. State whether or not she was in melancholy disposition at all at any time?

A. I never saw her that I would consider her melancholy.

Q. You say that Mary wanted the marriage consummated shortly after that for reasons she had of her own?

A. Yes sir.

Q. Did she express any of these reasons to you?

A. No sir. She said she had special reasons, she promised to tell me several times. She said the next time you come, I want to tell you about it. She wanted to tell me something. Still she did not seem to be melancholy, or disappointed. Something she wanted to tell me. I never of course could imagine what it was.

Q. Were your relations with her pleasant and happy?

A. Yes sir.

Q. Then your understanding with her at that time was, you were to be married shortly, in September next?

A. Yes sir, we about decided we would be married in September. I told her I only had been showing her attention less than a year, and I thought it was not too soon, if we delayed it until September. We were talking, that was our understanding at that time, general understanding. We were to be married in September, if mother and she were all well.

* * * * * * * *

Q. Who did she leave in charge of the house there on the corner of Eleventh and Commercial?

A. She left the house in charge of Mary and Fitzgerald. I believe he was to be with her as a party in the house.

Q. He occupied a room there?

A. Yes sir.

Q. Had he been there for some time?

A. Yes sir.

Q. That is all. He never boarded there with Baldwins?

99. A. I understand they wanted him to remain there as a protection, that is to be in the house merely, did not want to leave Mary alone there, wanted some one in the house.

* * * * * * * *

Q. Do you know whether the doors in the house were locked that night, when you left Mary there?

A. I asked Mary if the doors were locked, as I did almost every evening. I think every evening she told me everything was all safe. She said they were.

Q. What further conversation did you have with her about these things that night. About the house and her being there alone, your conversation with her, was in reference to these things?

A. It was her intention to go to Major Washer's, to stay during the night, and she told me on her way down to the ice cream saloon. When we got home she said, it was late and she did not want to disturb them over there. She was not afraid to stay alone, she felt perfectly safe, and she decided to stay there. She had had ladies stay there, and remain over night as company. She said she felt perfectly safe and would remain there instead of going over to Major Washer's and disturb them.

* * * * * * * *

101 *Cross Examination:*

Q. How old are you?

A. 40 the 15th day of October.

102 Q. Not at that time I suppose, when was the positive engagement?

A. We talked about marriage along in September last. We talked about the matter, it was generally understood, at least admitted on both sides, in case everything went smoothly, and we were agreeable and congenial, we should be married at some future time.

Q. Will you answer my question, and tell me when there was a positive engagement of marriage, if any?

A. What do you mean by positive engagement?

Q. When she promised to become your wife. Now state when did she agree to become your wife?

A. I could not tell the exact date. Some time. It may have been perhaps, October or November. I could not tell exactly, when I could not tell precisely.

Q. Can you give us the month?

A. It was one of those. Person becomes acquainted and gradually grows warmer and closer acquaintance, and it was understood we should be married.

Q. Can you give the month?

A. As to be positive, but I don't know as there was any real positive date. We talked the matter over, we were considered engaged.

Q. Did you ever in so many words ask her to become your wife?

A. Yes sir.

Q. Did she say she would?

A. I have talked with her.

Q. Did you ever in so many works ask her to become your wife?

A. Yes sir.

Q. When?

A. I could not tell you when.

Q. What year?

A. It was in September last year.

Q. When did her father die?

A. Her father died, I think, in November, 1884.

Q. Year ago this month?

A. Yes sir. I spoke to her before her father died.

Q. Now was there any day fixed for the consummation of the marriage contract?

A. We talked about having it consummated on Easter day.

Q. Had she made preparation for her marriage?

A. No sir, not that I know of.

Q. At whose suggestion was it postponed?

A. Mutual agreement.

Q. Was it not postponed at your request?

A. I don't know but I may have told her I was not quite ready.

Q. Did you not tell her it was not convenient for you to get married at the time stated?

A. Yes sir, perhaps I did.

Q. For that reason it was postponed?

A. Yes sir, I think so.

Q. Now as I understand you to say in your examination in chief you say that several times before her death, she urged you to consummate this marriage contract?

A. Yes sir. She spoke about it a number of times. Thought it was advisable; and consulted with her friends. And they also thought it was best.

Q. On the evening of her death, she said she had special reasons for its consummation before she went to Colorado?

A. She spoke about it. She said her mother was at the
103 Infirmary, and she might be there some time. My friends wanted her, and she thought it would be advisable for us to make a visit, and I become acquainted with her friends and she with mine; and her friends and my friends wanted her to come.

Q. In other words she was urgent about the matter, and she desired to be married in the absence of her mother, while her mother was in Iowa?

A. I don't know what her design was, to go to Bloomfield and be married there, I don't think she meant that.

Q. Didn't you testify in the preliminary examination her desire was to be married in her mother's absence, and go to New York or the east?

A. I did not intend to imply that it was to be secret, or anything of that kind.

Q. You did not intimate that?

A. I don't know as we ever spoke about her mother being present. I expected her mother would be present.

Q. You understood her desire to be married, while her mother was in Bloomfield?

A. She said her mother was in the Infirmary, and would be there some time. She thought it best for us to be married. After

we came back, her mother would be in condition, we would all go together to Colorado.

Q. Then her idea was to be married and take a trip east, when she got back her mother would be in condition to go to Colorado, you would all go together?

A. Yes sir.

Q. When she made that suggestion how would she treat it?

A. I told her as I knew her—

Q. How did you treat it, did you treat it indifferently?

A. No sir, I did not.

Q. I will ask you if in the preliminary examination, this question was not asked you—

A. I think I can tell you just what I said in the preliminary examination. I don't want you to distort what I said, just give what I said.

Q. I will ask you if this question wasn't asked you, she wanted to be married and make a visit while her mother was in Iowa?

A. Yes sir, she made that suggestion. I told her I would think it over. That is right.

Q. You don't remember?

A. Yes sir. I—

Q. I ask you was that question asked you?

A. I don't remember.

Q. Didn't you make answer then, I did not think it advisable?

A. Just read the rest of it.

Q. The question is this: You did not treat her suggestion as though you intended to carry it out at that time? Answer: I did not think it advisable.

A. Yes sir, I did not think it advisable at that time.

Q. That is what you answered?

A. Yes sir, for the reason I gave.

Q. Was this question asked you, you gave her to understand you received it in such manner, led her to believe it would be carried out, and to which you made answer, "I don't think I gave her much encouragement. I told her I would consider it, and she fell in with the idea. I told her I would consider it."

A. No sir, I don't think I ever used "she fell right in
104 with the idea;" I don't think I am in the habit of using such expressions. That is not just the way the question was put to me.

Q. I will ask you if the question wasn't asked you, "you treated it rather indifferently?" to which you answered, "Yes sir, but did not intend to treat her discourteously." Was that question asked you, and did you answer it so?

A. I never trifled with Mary.

Q. Was that question asked you and did you answer it so?

A. I would like if you would read it over again.

Q. "You treated it rather indifferently?" Answer, "Yes."

A. No sir, I don't think I ever said I treated her indifferently.

Q. The question and answer is this: "You treated it rather indifferently?" Answer, "Yes sir, but I did not intend to be discourteous." Did you so answer?

A. I think the way you read it would appear I was treating it rather lightly.

Q. I am asking you about whether it is right; did you testity so? You can answer, yes or no.

A. I think it is but a different shape.

Q. What you intended to say?

A. I think that is intended to say, was, I would consider the matter, and the way you read it sounds different from what I intended the idea I intended to convey.

Q. Now you say that on this Tuesday evening that you thought it was better to postpone it until in September, because you hadn't been acquainted long enough, that it was a serious matter?

A. No sir, not in September. I did not say so; this was a year from the time, I felt thoroughly acquainted with Mary at the time of her death, and for a few months before.

Q. I may have misunderstood you.

A. I think you have. I think you are trying to—

Q. I understand you to state on this Tuesday evening, in talking about this matter, you wanted it postponed until fall, in order so you would get better acquainted. Nothing of that kind you did not mean to say?

A No sir, I did not mean to say on this evening I was talking with her, I wanted to be better acquainted. I told her I wanted to be settled in business first. Have something under way, so I would know about making provision.

Q. Your business matters were somewhat unsettled?

A. Not unsettled, except I was not engaged in any actual business.

Q. You had no actual occupation?

A. I intended to go into some mercantile business, something of that kind. I wanted to be established. I don't want you to insinuate I am impecunious, or anything of that kind.

Q. No sir, I think you are a very liberal man.

A. No sir, I did not say I was a very liberal man.

* * * * * * * *

109 Q. Now you were there on the 21st of May when that house was burglarized?

A. I went up there after night, yes sir.

Q. I mean the following day.

A. Yes sir, I remember of going there the next day.

Q. Did you see what door the house had been entered at?

A. Yes sir. The day Mrs. Baldwin went away I put a bolt on it.

Q. The screen door cut?

A. Yes sir, just a very little.

Q. You put a bolt on the door?

A. I did the day Mrs. Baldwin went away.
Q. That was the day before she went away?
A. Yes sir.
Q. To Bloomfield, Iowa?
A. Yes sir.
Q. That is the door they entered the house, the burglars, May 21st, the way you understood it?
A. I saw the door after it was cut in, cut in that way. I suppose that is the door.

* * * * * * * *

113 Q. During the time you were acting as confidential adviser or as the adviser of Mrs. Baldwin and Mary, did you ever hear any complaint from Will Baldwin that he was not being treated fairly?
A. From him direct?
Q. Yes sir, from him.
A. He never came to me with his complaints.
Q. Did you ever hear him make any complaints?
A. No sir, I never heard him.
Q. Now, so far as you know, the estate was distributed, and each of them received an equal portion of their distributive share of the estate?
A. I suppose they did. Mrs. Baldwin made a settlement of what there was, and I suppose she made it correctly.
Q. What I mean by that, each one of them when they received a portion of their distributive share, received an equal amount. That is, Mary received $5000 and Will $5000, as you understood it?
A. You mean that was a portion to them?
Q. Yes sir, under the order of the Probate Court.
A. Yes sir, that is what I understood.
Q. So Mary did not receive any more than Will did, under the apportionment?
A. Not that I know of.

* * * * * * * *

114 Q. Now, on the morning after the 21st of May, I understood you to state, you were up at the house, and that there had been committed a burglary the night before?
A. Yes sir. She showed me footsteps about the place, around there, and they examined the tracks.
Q. Was there anything taken from the house?
A. She said there was.
Q. From what room?
A. She said there was something taken there, some money from Mary's room.

* * * * * * * *

133 Frank Price, sworn, testified on behalf of the State as follows, on direct examination:

Q. What is your official position?
A. City Marshal.
Q. Were you city marshal of the city of Atchison on the 8th of July last?
A. Yes sir.
Q. Did you visit the Baldwin house on the corner of 11th and Commercial, in the city of Atchison, on the evening of the 8th of July?
A. Yes sir.
Q. State whether or not you saw that door there?
A. Yes sir.

* * * * * * * *

135 Q. Where did you see that door?
A. At the north entrance of the house.

* * * * * * * *

Q. State what if anything was on the floor on the inside of the house near the door?
A. Some shavings and whittlings near the door.
Q. State what distance they were from the door sill.
A. They were scattered from the door sill all along, back as near as I can reccollect, perhaps from six to twelve inches, all along the floor.

* * * * * * * *

Q. Did you see Baldwin there, the defendant that evening?
A. Yes sir.
Q. Were you there when he came to the place?
A. I was there before he was.
Q. Were you there when he came?
A. Yes sir.
Q. Now what was his appearance there at the time he came to the place?
A. When I first noticed him, he was at the top of the stairs with Mr. Benning I think.
135 Q. What was his actions, and appearance, and conduct?
A. He was very nervous and excited.
Q. Excited and nervous?
A. Yes sir.
Q. Now do you know how long he staid there that evening, do you know when he went away?
A. Yes sir.
Q. How did he go away?
A. I took him home.
Q. In what way?
A. In my buggy.
Q. What was his appearance when he got in the buggy, how did he appear?

A. There did not seem to be anything unusual.
Q. What was his actions and conduct and looks?
A. I don't know, nothing uncommon at all.
Q. Was he crying?
A. No sir.
Q. Did he appear to be nervous?
A. Not as much as he did in the fore part of the evening.
Q. About what time of the night was it?
A. I think it was about half past eleven, perhaps later. About that time.

* * * * * * * *

Q. You attended the Coroner's jury didn't you, getting witnesses for them?
A. Yes sir.
Q. Do you remember of subpœnaing Mr. Baldwin as a witness before the Coroner's jury, when you first summoned them?
A. Yes sir.
Q. Where was he when you subpœned him as a witness?
A. He was in one of the lower apartments of the house. One of the lower rooms.
Q. Where was the jury?
A. Up stairs in the room where Miss Baldwin was murdered.
Q. In the room where she was murdered?
A. Yes, sir.
Q. Considering the case?
A. Yes, sir.
Q. Now just state what you did, how you subpoened Mr. Baldwin, what his acts and conduct were at the time. Describe it to the jury.
A. The jury were in the room, and it was decided to have him as a witness, that is to take his testimony at that time; and I took a subpoena and went down to the parlor, Mrs. Barrows' room, I think it is, and he was standing between two ladies, I think one of them was Mrs. Farries. I don't recollect the other. I placed my hand on him, and told him I wanted him, and he started, and he says, "I don't know anything about it." "Well," says I, "I want you now." Says he: "Get somebody else first. Get some one who knows something about it." I took him up stairs, to the foot of the stairs, and took him up stairs.
Q. Did you have to assist him up stairs?
A. Yes. sir.
Q. What was the appearance of his face at that time?
A. He was very nervous and showed a great deal of fear.
Defendant objects to the expression, "he showed fear," and asks that it be stricken out, as the opinion of the witness. Overruled, defendant duly excepting.

* * * * * * * *

143 John Donahue, sworn, testified on behalf of the State as follows:

Direct Examination:

Q. Where do you reside?
A. Atchison, Kansas.
Q. What is your business?
A. Deputy Sheriff.
Q. How long have you been Deputy Sheriff?
A. Since the first of last June.
Q. Are you acquainted with the defendant, Baldwin?
A. Yes, sir.
Q. State whether or not you had any conversation with him, in reference to his whereabouts on the night of the 7th of July last?
A. Yes, sir.
Q. State what the conversation was.
A. The day he was arrested, I think he was arrested Saturday morning, July 8th, 1885, and he was turned over to me some time during the day, and that evening I took him to the country, and on the way out we were talking, and I asked him how it was this man Baker, the carpenter, had testified of him being out that night, and of him telling it, and he says: "I did; what of it? I was out on necessary business."
Q. He said "he did tell him he was out, what of it; he was out on necessary business." Is that the answer?
A. Yes, sir, that is the answer.
Q. You had charge of him while he was in jail here, didn't you?
A. Yes, sir.
Q. Will you state what his conduct was and actions while in jail?
Objected to by defendant as incompetent to show whether he was depressed or not; and calling for the opinion of the witness; and irrelevant and immaterial, and no proper foundation laid to ask the question.
(By the Court)—What were his general actions and conduct?
Same objections. Overruled. Defendant excepts.
A. Very unruly.
144 Q. State what they were?
Objected to by defendant calling for opinion of witness; incompetent, irrelevant and immaterial, and no foundation laid to ask the question.
(By the Court)—State what his general demeanor was and general conduct?
Defendant duly excepts.
A. He was quarrelsome.
Defendant objected to answer as irrelevant, immaterial, and incompetent, and opinion of witness. Overruled, defendant excepting.
Q. What was his general demeanor as to grief or sorrow; did he manifest any evidence of grief or sorrow?

Objected to as leading, and calling for opinion of witness; immaterial, and incompetent. Objection overruled, defendant duly excepting.

A. At times he was wrestling and scuffling and boxing, and at other times he was fussing and fighting and also making threats.

Defendant objected to answer of witness, and asked that it be excluded as the opinion of the witness, and no proper foundation laid to ask the question. Incompetent, irrelevant and immaterial. Overruled, defendant excepting.

Q. Did you take a knife from Baldwin?

A. I don't remember whether I took the knife from him or whether it was given to me when he was turned over to me and I locked him up. I received a knife either from him or the constable.

Q. Have you the knife with you?

A. Yes sir.

Q. Please produce it. That was given you by him or somebody as his knife?

A. Yes sir, he acknowledged it was his knife.

(Witness hands knife to Mr. Gilbert, County Attorney.)

Q. IXL knife with three blades in it?

A. Yes sir.

* * * * * * * * *

Charles T. Baker, sworn, testifies on behalf of the State.

Direct Examination:

Q. Where do you reside?

A. Atchison.

* * * * * * * *

145 Q. State whether you were employed by Baldwin for any work?

A. Yes, sir.

Q. For what purpose?

A. To work on some cottages in West Atchison.

Q. Were you at work for him on the 8th of July last?

A. Yes, sir.

Q. What were you working at?

A. Shingling on the roof of one of his houses in West Atchison.

Q. Was Baldwin at the house that day?

A. Yes, sir.

Q. What time of day did you see him there?

A. He was there the best part of the day.

Q. Was he on the roof shingling the house at any time?

A. Yes, sir.

Q. Did you have any conversation with him there, on the roof of that house, that day, the 8th of July?

A. Yes, sir.

Q. Now will you state what that conversation was you had with him in reference to him being out the night before?

A. He said, I don't remember now what brought up the conversation, but I had spoken and said I could not be away at night, on account of my wife not liking to stay alone. She had staid alone when I was away, and he said, he could not be out either, and gave me an instance, by stating that he had got up, and gone out, I think he said, last night.

Q. That would be the night of the 7th of July?

A. Yes sir, and she waked up while he was gone, and when he came back he found her crying.

* * * * * * * *

Q. What time in the morning did he come to work that day?

A. I don't know what time.

Q. What time were you there?

A. Seven o'clock.

Q. Was he there then?

A. No sir; I don't know how long, some time after 8, it might have been 8, or might have been before or later.

Q. Did he work regularly, or was he away part of the day?

A. He was away part of the day, on account of lumber he had to get. He had to go to the lumber yard several times that day, for lumber we needed.

Q. Was he there in the afternoon?

A. Yes sir.

Q. When did he come in the afternoon?

A. I don't remember what time.

Q. How long did he stay in the afternoon?

A. I left him there.

Q. What time?

A. I guess six o'clock. Was the regular quitting time when I left.

Q. What did he say was the cause of him being out of his house that night of the 7th?

A. He said he had the dysentery.

Cross Examination:

Q. How long had you worked for Baldwin there, or with him?

A. I don't remember.

Q. It had been some time?

A. Yes sir; I think I commenced work for him in May or June, I don't remember which.

Q. Did you work continuously along up until July?

A. About a week I did not.

Q. During that time did he work with you?

A. Yes sir.

Q. He was industrious and attentive to his business?

A. Yes sir, I think he was.

Q. How many houses was he building there?

A. He was only building one house in South Atchison; built four in West Atchison.
Q. Which building were you working on at the time?
A. One in South Atchison.
Q. How much of a house was it?
A. I have forgotten the size of it.
Q. Approximate it.
147 A. 26 by 36.

* * * * * * * *

Q. How many men were at work Tuesday?
A. There were two of us besides Mr. Baldwin.
Q. Employes of his?
A. Yes sir.
Q. He worked there with you?
A. Yes sir, I think he did.
Q. Was there anything unusual there in his conduct that day?
A. No sir.
Q. Do you know what time he left that evening, Tuesday evening?
A. No sir. We generally left him there. He generally gathered up the lumber and straightened it up.
Q. What time did you usually leave?
A. Six o'clock.
Q. It was your usual custom to leave him there?
A. Yes sir.
Q. For that you know he was there Tuesday evening?
A. Yes sir.
Q. You saw nothing in his appearance Tuesday evening to attract your attention?
A. No sir.
Q. On Wednesday morning he was back at work?
A. Yes sir, he came back and went to work.
Q. Did he have any particular hour to go to work?
A. No sir.
Q. Nothing unusual for him not to be there before 8 o'clock?
A. No sir.
Q. During that time, he was at work all the time that he was at the building?
A. I think he was.
Q. Nothing unusual in his conduct?
A. I did not see anything.
Q. Nothing to create any suspicion in your mind?
A. No sir.

* * * * * * * *

148 Q. You don't know what time he left work Wednesday evening?
A. No sir, I do not. He was there when I left.

Q. Do you know of his employing any men to work there that evening?

A. Yes sir.

Q. What time?

A. He employed him sometime in the evening. I don't know what time. He was to go to work next morning.

Q What was Will Baldwin doing when you left there?

A. I don't know. He was straightening up generally around the yard and house.

Q. As usual?

A. Yes sir.

* * * * * * * *

149 B. F. Bingswanger, sworn, testified on behalf of the State as follows, on direct examination:

Q. Where do you reside?

A. St. Joseph, Mo.

Q. How long have you lived there?

A. Twenty five years.

Q. What is your business?

A. Druggist by trade.

Q. How long have you been a druggist?

A. Eight years.

Q. What place of business are you at?

A. Store called Brokaw's pharmacy.

Q. Where is that place located?

A. Corner Fourth and Edmund.

Q. St. Joe, Mo.

A. Yes sir.

Q. State whether or not you ever saw this picture before, (exhibiting a photograph of Baldwin to the witness; picture admitted to be that of the defendant)?

A. Yes sir.

Q. Where did you see it?

A. At Brokaw's pharmacy.

Q. Who presented it to you?

A. Yourself. (Mr. Gilbert.)

Q. Do you keep chloroform in your place of business?

A. Yes sir.

Q. For sale?

A. Yes sir.

Q. How long have you kept chloroform in your place of business for sale?

A. Ever since I have been there.

Q. How long did you say that was?

A. Since the 12th of January last.

Q. Do you use two ounce bottles for putting chloroform in?

A. Two ounce Blake.

Q. Have you got one with you?

A. Yes sir.

Q. Please present it. (Witness produces bottle.)

Q. If a person should come in and get chloroform, would you put it up in such a bottle?

A. Yes sir.

Q. You call it a two ounce Blake?

A. Yes sir.

Q. Do you use labels there for putting on bottles?

A. Yes sir.

Q. What kind of labels do you use to put on bottles to put chloroform in?

A. Label called a poison label.

Q. Have you any such label with you?

A. Yes sir.

Q. Present one. (Witness produces label.) How long have you had that label?

A. Since last January.

Q. Have you ever had any other poison label than that?

A. No sir.

Q. In your place of business?

A. No sir.

Q. Now read from that label what it reads.

150 A. "Poison. Brokaw's Pharmacy. Corner Fourth and Edmund Sts., St. Joe, Mo."

Q. When you saw that picture which you recognized here, state whether or not it made an impression on your mind, that you had seen it before.

A. When I first saw the picture, I think it made an impression, I had seen the same face before.

Q. Seemed to look like the picture?

A. Yes sir.

Q. Please compare the label, this label and the one on this bottle, and say whether in your opinion, it is the same label as yours.

A. It certainly has a striking similarity.

Q. What is your opinion as to that being your label?

A. At a glance, I should say the similarity would make me think it was our bottle label.

Q. How long have you been using those two ounce Blake bottles?

A. Since February last, and the labels since January, and have used no others since January.

Q. If you should sell chloroform, state whether or not you would use that label.

A. Use that label.

Q. Would you fill in the above—what would you fill in the above with?

A. With the word chloroform.

Q. I will ask you more particularly about these fragments on

the writing; state whether or not that is in your hand writing, in your belief?

A. It certainly looks like my hand writing.

Cross Examination:

Q. Where are these poison labels printed?
A. In Chicago.
Q. Purchased by all the druggists?
A. Taken from sample.
Q. No druggists have a monopoly on them?
A. No sir.
Q. How long have you been using that poison label?
A. Since January.
Q. Have you ever used any other poison label?
A. Never since January.

Re direct Examination:

Q. Did you ever see a poison label, exactly like that, with the words "Brokaw's pharmacy" under it?

A. No sir; not outside our store.

Q. Did you ever see a label in your entire experience as druggist that would have the word "pharmacy," and the letters "ma," would be just under the word "poison," as that does?

A. I never gave that close observation.

Q. You say you took these from sample, do they not when you send for them print by order below the word "poison?"

A. The print is by order.
Q. At your direction?
A. Yes sir.

451 *Re-cross Examination:*

Q. The skull and cross bones in the word poison are samples?

A. Yes sir; the persons name is filled in.

Re-direct Examination:

Q. Do you know of any druggist at all any where, in your experience, that has a label like that?

A. Not to my recollection.
Q. How do druggists obtain their labels?
A. From samples selected.
Q. They order them?
A. Yes sir, by numbers.
Q. Then they order the printing on them?
A. Yes sir.
Q. At their own direction?
A. Yes sir.
Q. Each one for himself?
A. Yes sir.

152 Lemuel James sworn, testified on behalf of the State as follows on direct examination :

Q. What is your business?

A. A carpenter.

Q. How long have you been a carpenter?

A. About twenty years.

* * * * * * * *

Q. What kind of a carpenter are you; how do you work in wood?

A. I worked at the carpenter building until a year ago last June. Since that time I have been working at pattern work in the pattern shop of Seaton & Lea's foundry.

Q. Explain what work you are called on to do in the pattern shop ; what are the tools?

A. I have to use about all the tools a carpenter has to use in any ordinary work.

* * * * * * * *

Q. Now state whether or not, from the way that appears to be cut in that panel, whether that knife could have cut it?

Objected to by defendant, as calling for opinion of witness and not a proper subject of expert testimony. Overruled, defendant excepting.

A. Yes sir, it could have been with that knife.

* * * * * * * *

Q. Now take the side marked outside there, and state whether or not, that was cut from that, or the other side. That is from the outside or the inside of the door?

A. I should say most emphatically from the outside. From the fact, there would be one eighth of an inch above, where the bottom of the panel was cut off. There's a straight cut across the door, which of course could not be made from the inside. And that top where this is cut off, is cut from the outside. And here is one place where the knife blade has been run through the door.

Q. Does the knife fit in that place?

A. Yes sir; fits there perfectly, is a perfect fit all round. I don't see a cut about the panel but what could be done with that knife.

* * * * * * * *

154 *Cross Examination :*

Q. How many knives in the city of Atchison do you suppose could have been used in making those marks?

A. I haven't the most remote idea.

155 Edward Worstall, sworn, testified on behalf of the State as follows on direct examination :

Q. What is your business?

A. A pattern maker.

Q. Just explain to the jury what your business is; what the nature of it is?

A. It is framing wood into certain shape to make iron castings from.

Q. What kind of tools do you use in such work?

A. Use all kinds of wood working tools.

Q. Knives of all kinds?

A. Yes sir.

* * * * * * * *

Q. Take that knife and this panel, and state whether or not that knife could have done the cutting that's done there in that panel?

Objected to by defendant as calling for opinion of witness, not proper subject for expert testimony. Overruled, defendant excepting.

A. Yes sir, it could have.

* * * * * * * *

156 State whether or not that knife does not exactly fit in those cuts?

Objected to as leading, calling for opinion of witness. Overruled, defendant excepting.

A. It did when I tried it before.

Q. State whether or not, in your opinion, that could have been cut with that knife.

Objected to by defendant as calling for opinion of witness, and not a proper subject of expert testimony. Objection overruled, defendant duly excepting.

A. Yes sir, it could have.

* * * * * * * *

Q. Then from that understanding, you say that knife could have done it?

Objected to by defendant as calling for opinion of witness, and not proper subject for expert testimony. Objection overruled, defendant duly excepting.

A. I think it could.

157 *Cross Examination:*

Q. A great many knives would cut through that way?

A. Yes sir.

Q. Great many knives like that "I. X. L.?"

A. Yes sir.

* * * * * * * *

162 J. J. Locker, sworn, testified on behalf of State as follows on direct examination;

Q. What official position do you occupy?
A. Probate Judge.
Q. How long have you been Probate Judge?
A. Since January, 1879.

* * * * * * * *

Q. Do you know anything about the estate of J. W. Baldwin?
A. I do; it has been administered upon partially.

* * * * * * * *

Q. Who, if anybody, was appointed administratrix of the estate?
A. Mrs. M. A. Baldwin.
Q. When were the letters of administration made?
A. 13th day of December, 1884.
Q. Who were the heirs of that estate?
A. M. A. Baldwin, widow; Mary A. Baldwin, daughter, and William Baldwin, son, of the deceased.
Q. Those are the only heirs to the estate?
163 A. Yes sir, the only heirs to the estate.
Q. Was there any inventory filed of the estate?
A. There was.
Q. From that inventory, what was the value of the estate?
A. Bonds, United States Treasury notes, $31,000; household furniture, $164.
Q. Anything else?
A. Just mentions family jewels. Gives no values.

* * * * * * * *

Q. Was there ever any distribution made of the estate?
A. Yes sir, two orders made upon the distributive shares to William and Mary A. Baldwin.
Q. How much?
A. There is an order in payment to William J. Baldwin, of the $5,500, as his distributive share.

* * * * * * * *

Q. Was he satisfied with the explanation and distribution of the estate?
Objected to by the State. Sustained, defendant duly excepting.

* * * * * * * *

167 James Bosanko, sworn, testified on behalf of the State as follows:

Direct Examination:

Q. What is your business?
A. Butcher.
Q. Are you acquainted with William Baldwin, defendant.

A. Yes sir.

Q. Did you see him on the night of the 8th of July, this
168 year.

A. I saw him the night they found his sister. I could not swear to the date.

Q. Where did you see him?

A. I first saw him just a little south of Billy Church's corner, coming down Eleventh.

Q. What time in the evening or night was it?

A. In the neighborhood of 7 o'clock.

Q. Which way was he going?

A. Going towards his mother's.

Q. Towards house on Commercial street?

A. Yes sir.

Q. Was he going there?

A. I don't know. He was going in the direction of his mother's.

Q. Did he know at that time of his sister's death? Did he know?

A. Not until I met him.

Q. Who informed him; did you?

A. Yes sir.

Q. What was his first action and appearance at that time? Did he appear to be at all surprised?

A. Do you want me to tell—as I came to the house, or as I started to him?

Q. You had gone to notify him?

A. I went out to the street to find him.

Q. Which was the occasion of your notifying him?

A. Yes sir.

Q. Were you to the house before that?

A. I was in the house. When the men came over to Mr. Talbott's I went in the house with them?

Q. State when you met him and notified him of his sister's death what his actions and appearance was, as to being surprised or otherwise?

A. We all came out of the house, Talbot and the other gentlemen on the stand here, I don't know their names, I would know their faces maybe, some one made the remark some one would have to go for the Coroner, and some one for the Marshal, and some one had better go and notify Billy. I had a horse, I says, I will go and find Billy and the rest of them. I don't know who started for the Marshal, or for the Coroner. And I looked up the street and I thought I saw Billy coming down by Church's. I held my horse up, he was rather headed to the back end of the alley. I backed my horse out of the alley, and led him part of the way between there, and the bridge that is half way, the other half of that block. When I met Will, he had then got down that far, I held hold of the reins to my horse, and stopped there and spoke. Says, "Billy, got sad news for you; your sister is dead." He says, "It can't be." I says, "It is true, it certainly is." "No," he says "it

can't be;" and my horse would not stand, I turned my attention to the horse, and he made some remark, connected with his mother. His mother's name was mentioned, and he turned from me and started on for the house. I did not see him any more, and I turned around and put my horse in the alley, and went to the house; when I came there, when I next saw him he was then—

Q. How did he come from you to the house?

A. I could not answer, for I could not see him.

Q. You could not see him when he left you?

A. No sir; my horse was unruly, and took all my attention.

Q. Were you looking at him when you announced to him his sister was dead?

A. Yes sir.

Q. Now what was his appearance, what was his actions,
169 then at that time.

A. He did not act as I would were I in his case.

Q. Then would you say he did not act natural?

Objected to. Sustained.

Q. Was there any appearance of surprise in his countenance?

A. He did not seem surprised, as I would be were I in his condition.

Q. Did he have anything in his hand?

A. I could not answer that he did.

Q. Was he reading something when walking down?

A. Not that I know of.

Q. As soon as you told him then, he said something about mother, and did not see him any more, until you saw him in the yard?

A. I did not see his face.

Q. Did he not turn at once and run to the house?

A. I could not say.

Q. The next time you saw him, you can testify to, was when you saw him in the yard?

A. Yes sir.

* * * * * * * *

173 Lewis Haynes, sworn, testified on behalf of the State as follows on direct examination:

Q. What is your business?

A. Carpenter.

Q. How long have you been a carpenter?

A. About twelve years.

Q. Do you know what Baldwin's business is?

A. Yes sir; carpenter.

Q. Did he learn his trade with you?

A. Yes sir; he did.

Q. Do you know of Will Baldwin's going to St. Joe, Mo.?

A. Yes sir; I do.

Q. What month was it?

A. I think in June.
Q. June, June last?
A. Yes sir.

* * * * * * * *

179 And the said defendant, William Baldwin, to maintain the issue on his part, introduced the following evidence to-wit:
206 Dr. W. W. Cochran, re-called, testified on behalf of defendant as follows, on direct examination:
Q. You say you have been a practicing physician 35 years?
A. Yes sir.
Q. During that time you have been at the bedside of a great many people who have died?
207 A. Yes sir.
Q. Saw a great many of their relatives there?
A. Yes sir.
Q. Is it anything unusual, is it unusual, to see relatives and near friends of deceased persons not to shed tears?
Objected to, sustained, defendant excepting.

Cross Examination:

Q. Doctor, you are not an expert on the tear shedding business?
A. No sir.
230 Lewis Hames, sworn, testified on behalf of the defendant on direct examination:
Q. Do you remember of seeing Will Baldwin in Kansas City?
A. Yes sir. I wish to make kind of a statement here. According to my testimony on Saturday I made a mistake.
Q. What was it?
A. I made a mistake in regard to the month he said he was going to St. Joe.
Q. When was it he was going to St. Joe?
A. The latter part of April or the first of May.
Q. Do you know as a fact whether he went to St. Joe of your own personal knowledge?
A. No, sir; I do not.

* * * * * * * *

Cross Examination:

Q. What is it recalls your recollection? Recalls that to your mind now that it was the latter part of April or May he told you he was going to St. Joe?
A. I found out I made a mistake in the month. I thought it was in June; but it was the latter part of April or in May. It was just after we started the building.
Q. What circumstance now recalls it to your mind?

A. Dedication Day recalls it to my mind. It was the next day after Dedication Day.

* * * * * * * *

232 John M. Crowell being sworn, testified on behalf of the State as follows in chief, on direct examination:

Q. What is your business?

A. Postoffice Inspector.

Q. How long have you been Postoffice Inspector?

A. Fifteen years.

* * * * * * * *

233 Q. What class of people do you come across in your business, in the discharge of your duties?

Objected to by defendant as incompetent and immaterial. Overruled, defendant duly excepting.

A. Come across all classes in my business.

Same objection. Overruled, defendant excepting.

Q. Do you have a great deal to do with criminals?

Same objection. Overruled, defendant excepting.

A. Yes sir, I do.

Q. State whether or not you are acquainted with the defendant here?

A. Yes sir, some; not particularly acquainted with him.

Q. State whether or not you met him on July 8th last?

A. Yes sir.

Q. Where did you meet him?

A. I saw him at his house, Baldwin's.

Q. Where his sister was lying dead?

A. Yes sir; stated she was dead.

Q. What conversation did you have with him that evening?

A. Shall I go on and tell the story?

Q. State what conversation and opinion you formed?

A. I had a conversation with him.

Q. What conversation did you have?

A. I went up there after 7 o'clock and found a big crowd around the house I first went back to the rear end of the house, and saw the door was cut, and past around the other way again, and came back into the east room, and saw Baldwin there, and said something about his sister; fearful thing, and if he had any suspicion, and he says: "No sir; but I will give a thousand dollars, I will give a thousand dollars to know who killed my sister."

Q. What was his appearance and conduct at that time?

Objected to by defendant. (By the Court)—You may state what he said, what he did and how he looked, and how he acted that night, but don't state and give your opinion simply.

A. When I asked him that question, I looked at him, and he did not appear to me ———

Objected to.

Q. State what his appearance was?

A. He did not look to me, in my experience, as a man who was grieved.

Objected to by defendant as incompetent, irrelevant and immaterial, and the opinion of the witness, and asks the court to strike it out. Overruled, defendant excepting.

Q. Now go on and state what his appearance was to you; go on and state what further you saw there; led you to believe he was not grieved?

A. I could not answer that question. I have just stated he did not look to me like a man was in sorrow. Looked excited. Looked like a guilty man to my experience.

Objected to and asked the Court to strike it out. (By the Court)—Gentlemen of the jury, that is a matter of opinion, and you need not consider it as evidence.

Q. In your experience dealing with criminals, state whether in your opinion, in your experience, he was guilty?

Objected to. Sustained.

238 And the evidence being closed, the said defendant asked the Court to give the jury the following instructions, to-wit:

* * * * * * * *

Third. The jury are instructed to every reasonable doubt, and neither a preponderance of the evidence, nor any weight of preponderant evidence, is sufficient for the purpose of conviction, unless it generates full belief of every material allegation in the information, to the exclusion of all reasonable doubt, for it is not enough that the evidence goes to show the guilt of the defendant, but the evidence must be inconsistent with every reasonable supposition of his innocence, or the jury will find the defendant not guilty.

D. Martin, District Judge.

Refused, and excepted to.

* * * * * * * *

239 *Seventh.* A few facts, or a multitude of facts proven, all consistent with the defendan't guilt, are not enough to warrant the jury in finding the defendant guilty; but in order for the jury to convict on circumstantial evidence, not only must the circumstances all go to show, that the defendant committed the crime charged, but they must all be inconsistent with any other rational conclusion, otherwise the jury must acquit.

D. Martin, District Judge.

Refused, and excepted to.

Eighth. In order to warrant a conviction on circumstantial evidence alone, the circumstances must form an unbroken link or chain, proved and established by competent evidence, and by the

same weight and force of evidence as if each one was itself the main fact in issue. D. Martin, District Judge.

Refused, and excepted to.

Ninth. It is not necessary that circumstantial evidence, in favor of the defendant, should be of a higher order, or as conclusive as that against the defendant. For the presumption of innocence in behalf of the defendant may be taken in consideration by the jury, to support any circumstance in his favor.

D. Martin, District Judge.

Refused, and excepted to.

Tenth. Any hypothesis, circumstance or evidence in this case, that the defendant committed the crime charged, must exclude every reasonable hypothesis of the defendant's innocence. And the evidence must be so convincing and conclusive in its character, as to fully satisfy the jury, beyond all reasonable doubt, that the defendant is guilty of the crime charged.

D. Martin, District Judge.

Refused, and excepted to.

Eleventh. The jury are instructed that evidence of suspicious circumstance alone, upon any one question, although tending to establish defendant's guilt, and although unexplained by him, are not of themselves sufficient to overcome the presumption in his favor, or to authorize the jury, upon them alone, to find a verdict of guilty. D. Martin, District Judge.

Refused, and excepted to.

Twelfth. The jury are instructed that the defendant is presumed innocent, of the act charged, and innocent of any guilty intent, and upon each of those questions, every reasonable doubt is with the defendant, and goes with him throughout the trial, and before the jury can find the defendant guilty, of any offense, they must be unable to reconcile all the evidence, with any other reasonable hypothesis, than that of the defendant's guilt.

D. Martin, District Judge.

Refused, and excepted to.

Thirteenth. The jury are instructed that the defendant, William J. Baldwin, can stand on the presumption of innocence, and is not required to offer any evidence, until the State has established beyond a reasonable doubt, each and every act necessary, to
240 constitute the crime charged against him; and a few facts, or a multitude of facts, proven, all consistant with the supposition of guilt, are not enough to warrant a verdict guilty; and in order to convict the defendant, it is necessary that the evidence should all concur, to show that the defendant committed the crime

charged, and must also establish to the satisfaction of the jury, beyond a reasonable doubt, that such evidence is inconsistent with any other rational conclusion, than that of the guilt of the defendant.

D. Martin, District Judge.

Refused, and excepted to.

* * * * * * * *

Fifteenth. The jury are instructed that the hypothesis, that the defendant committed the act charged, must exclude every reasonable hypothesis that it was committed by any other person.

D. Martin, District Judge.

Refused, and excepted to.

* * * * * * * *

Seventeenth. The jury are instructed that the utmost caution should be used in the application of a certain class of evidence in a criminal case. The establishment of a *prima facie* case only, does not take away the presumption of the innocence of the defendant, nor shift the burden of proof.

D. Martin, District Judge.

Refused, and excepted to.

* * * * * * * * *

241 *Twenty-one.* If the jury shall find from the evidence, that the defendant had no motive to commit the alleged offense, and further find that there is a possibility, that some other person committed the alleged homicide, they must acquit the defendant.

D. Martin, District Judge.

Refused, and excepted to.

Twenty-two. Wherever circumstantial evidence is introduced to connect the defendant with the criminal act, the circumstantial facts themselves must be connected with the defendant.

D. Martin, District Judge.

Refused, and excepted to.

* * * * * * * *

242 *Twenty-seven.* The jury are instructed to wholly disregard the testimony of any witness, as to his or her impression or opinion as to the defendant's guilt or innocence.

D. Martin, District Judge.

Refused, and excepted to.

* * * * * * * *

Which instructions and each thereof the Court refused to give. To which action and refusal of the Court to give said instructions, or each or any thereof, the defendant then and there duly excepted.

Thereupon the Court of its own motion gave to the jury the following instructions, and general charge, to-wit:

* * * * * * * *

244 *Three.* By the ancient Common Law of England, suicide or self-destruction, was treated as branch of the law of felonious homicide, and by the law since the deceased in such case had withdrawn himself from its reach, it could act only upon what he had left behind, namely, his reputation and his fortune; on the former, by ignominous burial in the highway, with a stake driven through his body; on the latter, by a forfeiture of all the goods and chattels of the deceased to the Crown, it being considered that the care for his own reputation, and the welfare of his family would be some motive to restrain a man from committing so desparate and wicked a deed. By an act of Parliament in the time of George the Fourth, however, the burial may now be made privately, in a church yard or other burial ground, without any stake being driven through the body, but the interment must be in the night time, and without the right of Christian burial.

255 And to the giving of said instructions, and to each thereof, and to every paragraph, word, line and sentence thereof, the defendant at the time, then and there duly objected. Which objection was at the time by the Court overruled, as to each paragraph, word, line and sentence thereof, to all of which the said defendant duly excepted. And the said defendant then and there, at the time duly excepted to each such instruction paragraph, word, line and sentence thereof.

* * * * * * * *

And after argument of counsel, the said case was submitted to the jury, and the jury, under charge of bailiff, retired to consider of their verdict, and thereon, November 18th, 1885, returned into Court, and through their foreman presented their verdict in said case, which is in words and figures as follows, to-wit:

THE STATE OF KANSAS)
vs.)
WILLIAM BALDWIN.)

VERDICT.

We, the jury duly empannelled, charged and sworn, in the above entitled action, do on our oath, find the defendant, William Baldwin, guilty of murder in the first degree, as charged in the first count of information. John Ernst, Foreman.

255 And thereafter on November 18th, 1885, the said defendant duly filed his motion for a new trial, which motion is in words and figures, to-wit:

* * * * * * * *

257 *First.* The Court erred in admitting the testimony of the witnesses James and Worstall, and in permitting them to give an opinion over the objections of the defendant.

* * * * * * * *

Third. That the Court erred in receiving incompetent testimony over the objections of the defendant, by reason of which defendant was prevented from having a fair and impartial trial.

* * * * * * * *

Seventh. Because the Court erred in its instructions to the jury, and especially in giving instructions 19, 20 and 23, which were duly excepted to by the defendant.

* * * * * * * *

258 *Eighth.* Because the Court erred in refusing to give proper instructions asked by the defendant.

* * * * * * * *

Fourteenth. Because the Court misdirected the jury in material matters of law.

Fifteenth. Because the verdict of the jury is contrary to evidence and against the weight of evidence.

Sixteenth. Because the verdict of the jury is contrary to law.

Seventeenth. Because the jury in arriving at their verdict disregarded the instructions of the Court.

259 And thereafter during said term of court said motion and amended motion came on for hearing, and the same being argued by counsel and considered by the Court were each by the Court overruled, to which action and ruling of the Court in overruling said motions and each thereof, and refusing to sustain the same the said defendant duly excepted.

* * * * * * * *

260 And afterwards, to-wit, on January 11th, A. D. 1886, at the adjourned session of the said November term, A. D. 1885, of said District Court, among other things done and determined the following appears of record as of that date, to-wit:

THE STATE OF KANSAS, *Plaintiff.*
vs.
WILLIAM BALDWIN, *Defendant.*

Now in this case plaintiff, by W. D. Gilbert, County Attorney, and S. H. Glenn, its attorneys, and the defendant appearing in person and by his attorneys, Everest & Waggener, and thereupon the defendant appeared for judgment, and being required to stand

up before the Court and being informed by the Court that he had been found guilty of murder in the first degree by a jury of his peers and being asked if he had any legal cause to show why the sentence of the Court as required by law should not be pronounced against him, and making no legal excuse, it is therefore ordered and adjudged by the Court here that the said defendant, William Baldwin, be conveyed from hence to the jail of Atchison County, Kansas, and from thence by the Sheriff of Atchison County, Kansas, conveyed to the penitentiary of the State of Kansas, there to be confined at hard labor for the period of one year from January 11 (eleventh), A. D. 1886, and until the Governor of the State of Kansas, by his order direct your execution, at which time so specified in such order, not less than one year, January 11th (eleventh), A D. 1886, said defendant, William Baldwin, be by the warden of the penitentiary of the State of Kansas hung by the neck until you are dead, and may God have mercy on your soul. To all of which at the time the defendant duly excepted. It is further ordered and adjudged that the defendant pay the costs of this prosecution, taxed at the sum of ———, defendant excepting.

* * * * * * * *

263 And be it further known that this case duly certified from the District Court aforesaid, came on to be heard at the January term of this court for the year 1886, on the 2d day of June, 1886, and was argued before said court on the 2d day of June, 1886, by Messrs. Everest & Waggener, attorneys for the appellant, William Baldwin, and by W. D. Gilbert County Attorney of Atchison County, Kansas, attorney for the appellee, The State of Kansas. And this court having held said case under advisement and duly considered the same, on the 9th day of December, 1886, filed the following syllabus and opinion, to-wit; to which said syllabus and to each and every part thereof, and to each and every proposition of law therein contained the said defendant did then and there duly except. And to which said opinion, and to each and every part thereof, and to each proposition of law thereof, and therein decided and laid down, the said defendant did then and there duly except.

---

264 ## OPINION SUPREME COURT.

STATE VS. BALDWIN.

(*Supreme Court of Kansas.* December 9, 1886.)

1. CRIMINAL LAW—APPEAL—SWEARING JURY—RECORD.

It is highly important and necessary that the oath should be administered to the jury in a criminal case with due solemnity, in the presence of the prisoner, and before the court, and sub-

stantially in the manner prescribed by law; but it is no part of the duty of the clerk to place on the record the formulary of words in which the oath is couched. He has performed his duty in that respect when he enters the fact that the jury was duly sworn, and, when that is done, the presumption will be that the oath was correctly administered.

2. SAME—SWEARING THE JURY—RECORD.

Where the recital in the judgment entry is that the parties appeared, "and, issue being joined upon a plea of not guilty, came a jury [naming them], twelve good and lawful men, having the qualifications of jurors, who, being duly elected, tried, and sworn well and truly to try the issues joined herein," it cannot be regarded as an attempt to set out in full the oath actually administered, but should rather be considered as a statement by the clerk that the jury had been sworn, and acted under oath; and the fact that there was no recital that the jury were required to give a true verdict, according to the law and the evidence, is not a ground for reversal.

3. SAME—IRREGULARITY IN OATH—NECESSITY OF OBJECTING.

Where a party desires to avail himself of irregularity in administering the oath to the jury, the attention of the court should be called to it at the time the oath is taken. A party cannot sit silently by, and take the chances of acquittal, and subsequently, when convicted, make objections to irregularity in the form of the oath.

4. SAME—BILL OF EXCEPTIONS.

Not only must the objections be made when the irregularity is committed, but the form in which the oath is taken, as well as the objection, should be incorporated in the bill of exceptions, in order that the court may see whether or not it is sufficient.

5. HOMICIDE—EVIDENCE—THEORY OF SUICIDE.

Where there are some circumstances which suggest that a person charged to have been murdered committed suicide, it is competent for the prosecution, for the purpose of repelling the theory of suicide, to show by an ordinary witness, who was intimate with the deceased, and was with her the evening before her death, that she was then in good spirits, and appeared to be happy.

6. EVIDENCE—OPINION—FACTS MADE UP OF COMBINATION OF APPEARANCES.

Facts which are made up of a great variety of circumstances, or combination of appearances, that cannot be fully described, may be shown by the opinion of ordinary witnesses, whose observation is such as to justify it. In this category

may be placed matters involving magnitude or quantities, portion of time, space, motion, gravitation, value, and such as relate to the condition or appearance of persons and things. On the same principle, the emotions or feelings of persons—such as grief, joy, despondency, anger, fear, and excitement—may be likewise shown.

7. CRIMINAL LAW—DEMEANOR OF PRISONER.

The demeanor of one charged with crime, at or near the time of its commission, or of his arrest for the same, may always be shown; and the testimony of the officer who subpœnaed and took the defendant before the coroner's jury, that "he was very nervous and showed a great deal of fear," was admissible.

8. SAME—GRIEF.

Whether defendant manifested evidence of grief on account of his sister's death was a proper inquiry of the State. Such inquiry, however, must be confined to a reasonable time after the death, or its discovery; and where the inquiry
265 relating to his conduct covered a period of four months thereafter, it is held to be an unreasonable time, but, under the testimony and circumstances of the case, it was not prejudicial error.

9. EVIDENCE—EXPERTS—WOOD-WORKERS.

A panel had been cut and taken from the outside door of the house where the offense was committed; and when the defendant, who was a carpenter, was arrested, a knife was found on his person. Winesses who were skilled workers in wood were called, and testified that the panel had been cut with a knife, and that the blade of defendant's knife exactly fitted the place where the panel had been pierced; that it had been cut from the outside by one skilled in the use of tools, and was evidently taken out by one who understood the construction of a door. *Held*, that the manner in which the cutting was done, and the effect of the tools upon the wood, involves skill and experience to judge of, and are not within common experience, and it was proper that the jury should be aided by the experience of experts.

10. HOMICIDE—EVIDENCE.

A check drawn by the defendant's mother, in favor of the deceased, for a sum of money, of which the defendant had no knowledge, was not admissible in evidence; but as it had no bearing upon the defendant, directly or remotely, it could not affect him injuriously.

11. SAME—THEORY OF SUICIDE.

A letter written by the deceased immediately preceding her death, which showed that she was in a healthful condition of

body and mind, and contained nothing prejudicial to the defendant, was admissible in evidence to show the condition of her health and mind, and to repel the theory that she committed suicide.

12. WITNESS—CROSS-EXAMINATION—PREVIOUS STATEMENT.

Where the defendant produced a witness who, with a view of showing the conscious innocence of the defendant, testified what his conduct and appearance was soon after the death of his sister, it was proper to inquire, on cross-examination, if the witness had not stated at the preliminary examination that the conduct of the defendant impressed him at once as being guilty of the murder.

13. SAME—MEMORANDUM—INDEPENDENT RECOLLECTION.

A witness may be permitted to refresh his memory from a writing or memorandum made by himself shortly after the occurrence of the fact to which it relates; but it is only when the memory needs assistance that resort may be had to these aids, and, if the witness has an independent recollection of the facts inquired about, there is no necessity nor propriety in his inspecting any writing or memorandum.

14. SAME—PREVIOUS STATEMENT—FOUNDATION FOR IMPEACHMENT.

Where, with a view of impeaching a witness, he is asked if he did not make a certain statement on a previous examination, and he replies that "it amounts to about the same thing," he thereby practically admits the making of the statement, and his answer is insufficient as a foundation for impeachment.

15. EVIDENCE—SCIENTIFIC BOOKS—EXPERTS.

Medical and scientific books cannot be admitted in evidence to prove the declarations or opinions which they contain; but a witness who is a medical expert is not confined wholly to his personal experience in the treatment of men, but may give his opinions formed, in part, from the reading of books prepared by persons of acknowledged ability; and it is not improper for him to give the source of his opinion, and that all the writers and authorities on the subject, so far as he knew, supported him in that opinion.

16. HOMICIDE—INSTRUCTIONS—POISONING.

The court charged the jury that, to convict the defendant, it must be shown that he purposely took the life of the deceased by administering poison to her. A murder that is committed by means of poison involves and presupposes the element of malice, premeditation, and deliberation, and hence it was needless for the court to state that they were prerequisites to a conviction.

17. SAME—COURT DEFINING WORDS.

The court takes notice of the meaning and force of the ordinary words of our language, and also of technical words, where their meaning is well settled by common usage; and the court may, where it is necessary, define and explain them to the jury. It was therefore not error for the court to
266 instruct the jury as to the ordinary meaning and definition of "anæsthetic," "chloroform," and "poison," as given by Webster's Dictionary, and other words of standard authority, where it appears that the definitions were correct in every respect.

18. SAME—REVIEWING THE FACTS.

The court may review and present the facts in a criminal case, provided the jury are informed that they are the exclusive judges of every question of fact; and hence, where the definitions and comments of the court upon words that are technical and peculiar to a science are in keeping with the testimony given regarding such words, there is no error.

19. SAME—CHLOROFORM AS A POISON.

As the Legislature has published and declared chloroform to be a virulent poison, by a law which all are presumed to know, it was not error for the court to say to the jury that, "in common parlance, chloroform is classed among the poisons," when he couples with the statement the direction that it was still necessary for the jury to find from the evidence that chloroform is a poison, before the defendant could be convicted.

20. SAME—REQUEST—MOTIVE.

The defendant cannot be heard to complain of an instruction requested by himself; and, with respect to motive, it was not error for the court to instruct that defendant should be judged by the information upon which he acted, rather than upon the accuracy of his information.

21. SAME—NEW TRIAL—FINDING OF LOWER COURT.

The finding of the court upon the question of fact presented in a motion for a new trial, which is made upon oral and conflicting testimony, is as conclusive upon this court as the verdict of a jury founded on like testimony, and which has received the approval of the trial court.

22. SAME—REVERSAL, FOR WHAT.

A judgment of the District Court should not be reversed except for prejudicial error.

23. SAME—EVIDENCE REVIEWED.

The evidence in the record examined, and *held* to be sufficient to sustain a verdict finding the defendant guilty of committing murder by means of poison.

(*Syllabus by the Court.*)

Appeal from District Court, Atchison County.

Information for murder. Judgment of conviction. Defendant appeals.

W. D. Gilbert and S. B. Bradford, Attorney General, for the State. Everest & Waggener, for appellant.

JOHNSTON, J. William Baldwin was informed against, tried, and convicted of the crime of murdering his sister, Mary Baldwin. The information consisted of two counts, in the first of which it was charged that the defendant, on or about the eighth day of July, 1885, administered to Mary Baldwin an anæsthetic, to-wit, chloroform, which is alleged to be a deadly poison, with the felonious intent to kill and murder her. In the second count the charge is that the death of Mary Baldwin was occasioned by the defendant pressing a pillow on, over, and against her mouth, nose, and face, thereby preventing respiration, and causing death. The jury found him guilty of murder in the first degree, under the first count of the information, and he was thereupon sentenced and adjudged to suffer death. From that sentence and judgment he appeals to this court, and in the elaborate brief filed by his counsel there are forty-seven assignments of error, many of which were not referred to in the oral argument, and some of which are unimportant. The alleged errors have all been examined, and such of them as are deemed worthy of notice will be considered and disposed of in their order of presentation here.

1. The first assignment is that the jury were not duly sworn. In the journal entry of the proceedings at the opening of the trial it is stated that the parties appeared, and, issue being joined upon a plea of not guilty, a jury came (naming them), "twelve good and lawful men, having the qualifications of jurors, who, being duly elected, tried, and sworn well and truly to try the issue joined herein, pending the introduction of testimony, the court adjourned until to-morrow morning," etc. The exact form of the oath to be taken by the jury is not laid down in the statute, but, with respect to administering the oath, it is provided that "the jury shall be sworn to well and truly try the matters submitted to them in the case in hearing, and a true verdict give, according to the law and evidence." Crim. Code, § 208; Civil Code, § 274.

The contention of the defendant is that the record undertakes to set out the oath actually administered to the jury, and that, as it omitted the essential part of requiring that they should a true verdict give according to the law and the evidence, the judgment should be reversed. It is highly important and necessary that the oath should be administered with due solemnity, in the presence of the prisoner, and before the court, substantially in the manner prescribed by law. It may also be conceded that the record should show that the jury were sworn, and, when the record does purport to set out in full the form of the oath upon which the verdict is

based, it must be in substantial compliance with law; otherwise the conviction cannot stand. The assumption by counsel that the oath as actually administered is set out in full in the record, it seems to us, is unwarranted. What is stated in the record is but a recital by the clerk of the fact that the jury were sworn. The swearing was, of course, done orally, in open court; and it is no part of the duty of the clerk to place on the record the exact formulary of words in which the oath was couched. He has performed his duty in that respect when he enters the fact that the jury was duly sworn, and when that is done the presumption will be that the oath was correctly administered. The method of examining the jurors as to their qualifications, or whether the oath was taken by them while standing with uplifted hands, according to the universal practice in the State, or otherwise, is not stated. In making mention of the impaneling and swearing of the jury, there is no description of the parties between whom the jury are to decide, nor, indeed, is there any of the formal parts of an oath stated. The statement made is only a recital of a past occurrence; and it is manifest that there was no intention or attempt of the clerk to give a detailed account of the manner of impaneling the jury, or to set out the oath *in hæc verba*. It may be observed that in the form of the verdict returned, and which was prepared and presented to the jury by the trial judge, it was stated that the jury were duly impaneled and *sworn*. Counsel for defendant have called our attention to the case of *Johnson* vs. *State*, 47 Ala. 62, where the record entry of the swearing of the jury is substantially what it is in the present case. The court there treated the recital as stating the form and substance of the oath administered, and held that the omission of the injunction to render a true verdict, according to the law and the testimony, was fatal. The question was before the same court in a later case, and the ruling in *Johnson* vs. *State*, *supra*, which had been followed in some other cases, was expressly overruled. *Mitchell* vs. *State*, 58 Ala. 417. In the latter case the court held that recitals in the record relative to the swearing of the jury, like the one found in the record before us, are not to be regarded as an attempt to set out the oath actually administered, but should rather be considered as a statement of the fact that the jury had been sworn, and acted under oath. This view seems to us to be reasonable and right, and it is one which has been generally adopted. *Boose* vs. *State*, 10 Ohio St. 575; *Dyson* vs. *State*, 26 Miss. 362; *Bartlett* vs. *State*, 28 Ohio St. 669; *Atkins* vs. *State*, 60 Ala. 45; Thom. & M. Juries, § 299, and note.

A still more conclusive answer on this point is that no objection was made to the form of the oath when it was administered, or at any other time prior to its presentation in this court. If there was any irregularity in this respect, it should, and probably would, have been objected to at the time it occurred. It is quite unlikely that there was any departure from the form of the oath so well under-

stood, and which is in universal use in all of the courts of the State; but, if the form of the oath was defective, the attention of the court

v.12p.no.9—21

268 should have been called to it at the time the oath was taken, so that it might have been corrected. A party cannot sit silently by, and take the chances of acquittal, and subsequently, when convicted, make objections to an irregularity in the form of the oath. Not only must the objection be made when the irregularity is committed, but the form in which the oath was taken, as well as the objection, should be incorporated into the bill of exceptions, in order that this court may see whether or not it is sufficient, and this was not done.

2. The assignments of error from the third to the twentieth, inclusive, are based on the ruling of the court in the admission of testimony. The first six of these objections relate to the testimony of Albert H. Lewis. This witness was an intimate acquaintance of the Baldwin family, which consisted of the deceased, the appellant, and their mother, M. A. Baldwin. J. W. Baldwin, the father of Mary and William Baldwin, died in November, 1884, leaving an estate of considerable value, and the widow, M. A. Baldwin, was appointed administratrix of the estate. Lewis was a frequent visitor at the Baldwin homestead, was engaged to be married to Mary, and he was the confidential adviser of her mother in the management of the estate, and assisted in investing the money of the estate. In the course of the trial, Lewis was asked to state whether he had been frequently called on by Mrs. Baldwin, after the death of her husband, to counsel about the estate, and also whether the appellant was ever called on at these times to counsel with them. These questions, although not very material, were competent for the purpose of eliciting the relations existing among the members of the Baldwin family. The objection especially urged against the admission of the testimony is that the defendant had no knowledge that his mother counseled with Lewis about the estate, and that no such consultation was had with Lewis in the presence of the defendant. This claim is not borne out by the evidence in the record. In the answer to the question objected to it is stated that, in one instance, the defendant was called in to confer with Lewis and his mother in regard to the investment of funds belonging to the estate. On another occasion the appellant accompanied Lewis to inspect security that was offered upon a loan negotiated by Lewis for the estate, and, indeed, the conduct of the appellant in frequently applying for money from his mother, through Lewis, leaves no doubt about the question. The further evidence relating to Lewis transacting business at the banks for Mrs. Baldwin, in reference to deposits, as well as that showing that money was drawn from the banks upon checks signed by Mary and her mother, is unobjectionable, and cannot in any way be considered prejudicial to the defendant.

3. About two weeks prior to Mary's death, her mother, who was in ill health, went to an infirmary in Iowa for medical treatment, where she remained until notice was received of her daughter's death. The only occupants of the house during her absence were Mary and a male lodger. Occasionally some of her lady friends would stay over night with her, but on the night of her death she was alone. The evening prior to her death she spent in the company of Lewis, who remained with her until about ten o'clock. On the next evening her dead body was discovered in her bed room. She was found lying in bed, robed in a night-dress, with a pillow lying upon her face, and a small chloroform bottle was found near by her in the bed, upon which there was a poison label. With the evident purpose of repelling the theory of suicide, Lewis was asked by the State whether, on the evening prior to Mary's death, there was anything in her appearance that made him believe she was in grief or was dissatisfied. He stated that there was not, but that she was in good spirits, and, when he left her, she seemed to be happy. It is claimed that this testimony was incompetent, because it was but an opinion formed from her appearance. It is a well known general rule that witnesses are not to give their individual opinions, but are to state the facts, from which the jury are to form their opinions. There are, how-
269 ever, exceptions to this rule, which are as well defined as the rule itself. Whenever the question at issue is outside of the knowledge and experience of ordinary jurors, or where it so far partakes of the nature of science or trade as to require special and peculiar knowledge or skill in order to arrive at a correct conclusion, the opinions of experts are admissible. There is another equally well recognized exception, founded in necessity, under which the opinions of ordinary witnesses are received. Facts which are made up of a great variety of circumstances, and a combination of appearances which, from the infirmity of language, cannot be properly described, may be shown by witnesses who observed them; and, where their observation is such as to justify it, they may state the conclusions of their own minds. In this category may be placed matters involving magnitude or quantities, portions of time, space, motion, gravitation, value, and such as relate to the condition or appearance of persons and things. *City of Parsons* vs. *Lindsay*, 26 Kan. 426; *State* vs. *Folwell*, 14 Kan. 105. On the same principle, the emotions or feelings of persons—such as grief, joy, hope, despondency, anger, fear, and excitement—may be likewise shown, and hence the testimony objected to was properly admitted. Lawson, Exp. Ev. rule 64; 2 Best, Ev. § 517.

Lewis was intimately acquainted with the deceased. He had visited her almost daily for many months, and was with her a few hours before her death. The relation in which he stood to her, and his opportunity to observe her, certainly enabled him to read her conduct, gesture, tone, and expression of eye and face, and to form an intelligent opinion as to whether she was depressed or

in grief. By her appearance he could determine her condition of mind with almost unerring accuracy; and yet how futile it would have been for him to have attempted to portray to the jury the facial expression, the looks of the eye, or the inflection of the voice which led him to believe she was in a happy frame of mind. This species of evidence is admitted because it is the best which, in the nature of things, can be obtained, the value of which depends, of course, upon the capability of the witnesses, and the means that they had of forming an opinion, which may be ascertained and thoroughly tested upon cross-examination.

What has been said here disposes of the objection urged against the testimony of Frank Price, the city marshal, who was present at the Baldwin residence on the evening that Mary's death was discovered, and who attended upon the coroner's jury that was empaneled to inquire into the cause of her death. He stated, in response to inquiries made by the state, that the defendant "was very nervous, and showed a great deal of fear," when he was subpœnaed and taken as a witness before the coroner's jury. The conduct of one charged with crime about the time of its commission, or at the time of his arrest, may always be shown; and, under the rule which we have been considering, the opinion of the witness that the defendant appeared to be in fear at that time was admissible. *Brownell* vs. *People*, 38 Mich. 732.

4. Objection is also made to the testimony of John Donahue, the jailor who had charge of the defendant from the time of his arrest, which was made about ten days after the crime was discovered. He was asked what was the general demeanor and conduct of the prisoner during the time he had him in charge, as to grief and sorrow, or whether the defendant manifested any evidence of grief or sorrow. He answered that the defendant was unruly and quarrelsome, and that at times he was wrestling, scuffling, and boxing, and at other times was fussing and fighting, and making threats. This inquiry was evidently not made with a view to initiate an inquiry into the general character of the defendant, nor to show that he had committed other offenses, and therefore many of the authorities cited by counsel are inapplicable. The manifest purpose of the testimony was to show that he was apathetic regarding his sister's death, and did not evince that feeling and sensibility
270 to be expected of a brother. As has been said, the conduct and demeanor of the prisoner at the time of his arrest, or soon after the commission of the crime, may go to the jury as evidence of a guilty mind, and, so far as the testimony was confined to a reasonable time after the discovery of the crime and his arrest, it was certainly admissible. *Greenfield* vs. *People*, 85 N. Y. 75. We are inclined to the opinion that the inquiry was too general, and extended over too great a period; as the defendant was in charge of the witness from the time of the arrest to the time of the trial, a period of about four months, and for this reason, as well as that the testimony was somewhat unresponsive and irrele-

vant, we think the motion to strike it out ought to have been sustained. However, the testimony shows that the defendant did not manifest evidence of grief at the loss of his sister at any time while he was in jail, and was not much affected by her unnatural death; and hence the fact that the inquiry concerning his demeanor covered too much time could not have injured him. And when we consider that the charge against which he was defending, and of which he was convicted, was that of poisoning his sister, the somewhat irrelevant statement of the witness that he was fussing and fighting while confined in jail did not operate, we think, to prejudice him in the minds of the jury.

5. There was no error, we think, in admitting the testimony of James and Warstall. They were carpenters with large experience as pattern makers and workers in wood. It seems that the parties who discovered the dead body of Mary Baldwin at the same time found that a panel of an outside door of the Baldwin house had been cut and taken out. It appeared that the defendant was a carpenter also, and a knife was found on his person which, with the door and panel, were brought into court. These witnesses stated that the panel, which was one-sixteenth of an inch in thickness, had been cut out with a knife, and could have been cut by the defendant's knife; that the blade of the knife exactly fitted the place where the panel had been pierced; that the cutting was done by a person skilled in the use of tools; and, after explaining the peculiar manner in which the door was constructed, stated that the panel was evidently taken out by one who understood the construction of a door, and also that it was cut from the outside. The evidence offered to sustain the conviction in this case is wholly circumstantial, and the testimony of experts was more than ordinarily important. These men were skilled workers in wood, and their experience enabled them to judge, from the marks and impression left upon the door by the tool used, whether it had been cut with a knife, chisel, or saw; whether it had been cut by a thick or a thin bladed knife; whether it had been cut by one accustomed to the use of tools; and the marks or traces made upon the wood by the knife would indicate to the trained eye whether it had been cut from the outside or the inside. The manner in which the cutting was done, and the effect of the tools upon the wood, involve skill and experience to judge of, and are not within common experience; and it was therefore proper that the jury should be aided by the experience of these experts. *Com.* vs. *Choate*, 105 Mass. 451.

6. A check drawn by Mrs. Baldwin in favor of the deceased was offered in evidence, of which the following is a copy:

"ATCHISON, July 7, 1885.

"*The Atchison Savings Bank*: Pay to Mary Baldwin, or order, five hundred and fifty dollars ($550).

[Signed] "MRS. M. A. BALDWIN."

This was admitted for the purpose of showing the dealings among

in grief. By her appearance he could determine her condition of mind with almost unerring accuracy; and yet how futile it would have been for him to have attempted to portray to the jury the facial expression, the looks of the eye, or the inflection of the voice which led him to believe she was in a happy frame of mind. This species of evidence is admitted because it is the best which, in the nature of things, can be obtained, the value of which depends, of course, upon the capability of the witnesses, and the means that they had of forming an opinion, which may be ascertained and thoroughly tested upon cross-examination.

What has been said here disposes of the objection urged against the testimony of Frank Price, the city marshal, who was present at the Baldwin residence on the evening that Mary's death was discovered, and who attended upon the coroner's jury that was empaneled to inquire into the cause of her death. He stated, in response to inquiries made by the state, that the defendant "was very nervous, and showed a great deal of fear," when he was subpœnaed and taken as a witness before the coroner's jury. The conduct of one charged with crime about the time of its commission, or at the time of his arrest, may always be shown; and, under the rule which we have been considering, the opinion of the witness that the defendant appeared to be in fear at that time was admissible. *Brownell* vs. *People*, 38 Mich. 732.

4. Objection is also made to the testimony of John Donahue, the jailor who had charge of the defendant from the time of his arrest, which was made about ten days after the crime was discovered. He was asked what was the general demeanor and conduct of the prisoner during the time he had him in charge, as to grief and sorrow, or whether the defendant manifested any evidence of grief or sorrow. He answered that the defendant was unruly and quarrelsome, and that at times he was wrestling, scuffling, and boxing, and at other times was fussing and fighting, and making threats. This inquiry was evidently not made with a view to initiate an inquiry into the general character of the defendant, nor to show that he had committed other offenses, and therefore many of the authorities cited by counsel are inapplicable. The manifest purpose of the testimony was to show that he was apathetic regarding his sister's death, and did not evince that feeling and sensibility
270 to be expected of a brother. As has been said, the conduct and demeanor of the prisoner at the time of his arrest, or soon after the commission of the crime, may go to the jury as evidence of a guilty mind, and, so far as the testimony was confined to a reasonable time after the discovery of the crime and his arrest, it was certainly admissible. *Greenfield* vs. *People*, 85 N. Y. 75. We are inclined to the opinion that the inquiry was too general, and extended over too great a period; as the defendant was in charge of the witness from the time of the arrest to the time of the trial, a period of about four months, and for this reason, as well as that the testimony was somewhat unresponsive and irrele-

vant, we think the motion to strike it out ought to have been sustained. However, the testimony shows that the defendant did not manifest evidence of grief at the loss of his sister at any time while he was in jail, and was not much affected by her unnatural death; and hence the fact that the inquiry concerning his demeanor covered too much time could not have injured him. And when we consider that the charge against which he was defending, and of which he was convicted, was that of poisoning his sister, the somewhat irrelevant statement of the witness that he was fussing and fighting while confined in jail did not operate, we think, to prejudice him in the minds of the jury.

5. There was no error, we think, in admitting the testimony of James and Warstall. They were carpenters with large experience as pattern makers and workers in wood. It seems that the parties who discovered the dead body of Mary Baldwin at the same time found that a panel of an outside door of the Baldwin house had been cut and taken out. It appeared that the defendant was a carpenter also, and a knife was found on his person which, with the door and panel, were brought into court. These witnesses stated that the panel, which was one-sixteenth of an inch in thickness, had been cut out with a knife, and could have been cut by the defendant's knife; that the blade of the knife exactly fitted the place where the panel had been pierced; that the cutting was done by a person skilled in the use of tools; and, after explaining the peculiar manner in which the door was constructed, stated that the panel was evidently taken out by one who understood the construction of a door, and also that it was cut from the outside. The evidence offered to sustain the conviction in this case is wholly circumstantial, and the testimony of experts was more than ordinarily important. These men were skilled workers in wood, and their experience enabled them to judge, from the marks and impression left upon the door by the tool used, whether it had been cut with a knife, chisel, or saw; whether it had been cut by a thick or a thin bladed knife; whether it had been cut by one accustomed to the use of tools; and the marks or traces made upon the wood by the knife would indicate to the trained eye whether it had been cut from the outside or the inside. The manner in which the cutting was done, and the effect of the tools upon the wood, involve skill and experience to judge of, and are not within common experience; and it was therefore proper that the jury should be aided by the experience of these experts. *Com.* vs. *Choate*, 105 Mass. 451.

6. A check drawn by Mrs. Baldwin in favor of the deceased was offered in evidence, of which the following is a copy:

"ATCHISON, July 7, 1885.

"*The Atchison Savings Bank*: Pay to Mary Baldwin, or order, five hundred and fifty dollars ($550).

[Signed] "MRS. M. A. BALDWIN."

This was admitted for the purpose of showing the dealings among

the members of the Baldwin family. The consideration of the check, or the purpose of Mrs. Baldwin in making it, is not disclosed in the testimony. It is not shown that the defendant had any knowledge of its existence prior to the time it was offered in evidence, or was in any way concerned with it. It was written on the blank check of a bank at Bloomfield, Iowa, where Mrs.
271 Baldwin was staying; was written by her; and these facts, together with the date of the check, show that it could not have even reached Atchison prior to Mary's death. The check was not referred to in the letters of the defendant, or of the deceased, nor was it identified by any of the other testimony; and, as it was not shown to have been in any way connected with the defendant, it was incompetent. But, although erroneously admitted, it had no bearing upon the defendant, directly or remotely, and we fail to see how its admission could have affected him injuriously. It was therefore an unimportant and harmless error; and the Legislature has stated that errors and defects that are unimportant, and which do not affect the substantial rights of the appellant in criminal cases, furnish no grounds for a reversal. Crim. Code, § 293.

7. A letter of the deceased to her mother, written just before her death, and postmarked afterwards, clearly showed that she was then in a healthful condition of body and mind. She described the occurrences in the town, and the affairs at home; spoke hopefully of the future; and referred with evident pleasure to the constant attention and devotion of him to whom she was betrothed. The letter indicates cheerfulness and contentment, and contains nothing prejudicial to the defendant. It disclosed her condition of health and mind, which were wholly inconsistent with the theory of suicide, and for this reason and purpose it was admissible. Roscoe, Crim. Ev. 30; 3 Greenl, Ev. § 135, and note. Her letter, written in 1882, long prior to her father's death, was too remote. It was not claimed by the State that other than friendly relations existed between the deceased and the defendant before his father's death, and therefore it was not error to exclude the letter.

8- The objections urged to the question asked the clergyman, Mulford, on cross-examination, are not good. After stating in his examination in chief what the conduct and appearance of the defendant was soon after the death of his sister, with a view of showing the conscious innocence of the defendant, it was proper to inquire if the witness had not stated, before the coroner's jury, that the defendant impressed him at once as being guilty of the murder. It was allowable on cross-examination, and, besides, if denied, it afforded a foundation for impeaching the witness. He gave a qualified answer, saying that he would not deny or affirm that he had so stated, but did not deny stating that he had a thorough impression of his guilt, and he added that the appearance of the defendant was that of painful surprise that any one should

suspect him of the offense. We cannot agree that the ruling was erroneous.

9. Complaint is made of the ruling of the court in sustaining objections to the testimony of R. B. Spitler. He is a stenographer who was in the employ of the defendant's attorneys at the time of the preliminary examination, and took a stenographic report of the evidence then given. He transcribed the report, and then destroyed his original notes. At the trial he was placed on the stand with his transcript in hand, and, with a view of impeaching the witnesses Price, James, and Warstall, he was requested to refresh his recollection from the transcript, and give the testimony of those witnesses on certain matters, when the objection of the State was sustained. That a witness may be permitted to refresh his memory from a writing or memorandum made by himself shortly after the occurrence of the fact to which it relates, is unquestioned. The writing and memorandum are used, not as evidence, but to aid the memory; as the facts must finally be stated by the witness from personal knowledge and recollection. If the witness has an independent recollection of the facts inquired about, there is no necessity or propriety in inspecting any notes or writing. It is only when the memory needs assistance that resort may be had to these aids. Now, Spitler had an independent recollection of what was said by James and Warstall, and repeated it before the jury; and therefore there can be no objection to the ruling of the court, so far as it related to the testimony of those witnesses. So far as it related
272 to the testimony of Price, Spitler was not asked whether he had an independent recollection of what was said by him, and hence the necessity of resorting to the transcript was not apparent. It appears, however, that there was another sufficient reason for excluding the testimony. It was intended as impeaching evidence, which can only be used where a proper foundation has been laid. Spitler was asked to refresh his memory, and see if Price did not state, on the preliminary examination, that, when the defendant was told that his sister was dead, "he seemed to be considerably broke up over it." Looking back at the testimony of Price, we observe that the question was: "Did you not say, in answer to a question of Mr. Gilbert, that he seemed to be considerably broke up over it?" The answer of Price was "I think it amounts to about the same thing." Having admitted the making of the statement, the impeaching question was wholly immaterial, and had no foundation on which to rest.

10. It is contended that the testimony of John M. Crowell was erroneously admitted. The point of objection is that he testified as an expert,—as one skilled and experienced in detecting crime from the appearance of those charged with it. It is true, the prosecution seemed, from the questions, to have attempted to use the witness as an expert, but without success. He stated that for fifteen years he had been a postoffice inspector, had had considerable to do with criminals; that he saw the defendant at the Baldwin

house while his sister was lying dead there, and observed and conversed with him; and the witness was then asked if, in his experience in dealing with criminals, it was his opinion that the defendant had the appearance of being a guilty man. This was very properly excluded by the court; and in another part of the examination, where the witness volunteered the opinion that the defendant looked guilty, the court promptly admonished the jury that the statement was not evidence, and should not be considered by them. It is true that the witness was permitted to state that the defendant did not appear to be grieved. This testimony, as we have already seen, is allowable; and the fact that the witness was an intelligent and observing man, with a knowledge of physiognomy, certainly could not make his testimony that the defendant showed no signs of grief incompetent, or any the less valuable. It seems to us that the judge was careful and alert in guarding the interests of the defendant, in excluding the illegal testimony of this witness, and by allowing him to speak only as an ordinary witness.

11. The only remaining objection to the rulings upon the evidence is to the testimony of Dr. Campbell, who was a practicing physician of more than twelve years' experience. He testified as an expert, and, after showing some of the effects of chloroform upon the human system, was asked: "How is it regarded by medical authority upon that subject, and by medical men who are authority on that subject?" He answered: "It is regarded by writers on that subject, and by all men who have used it to any great extent, and by all universally, so far as I know, as a very dangerous agent, and an agent, if pushed beyond a certain point, which will produce death,—that is, in danger always of producing death. To be sure, a great many men have used it a great deal, and have had no bad results from it." Although the courts are not uniform in their holdings upon the admissibility in evidence of medical and scientific books, the great weight of authority is that they cannot be admitted to prove the declarations or opinions which they contain. This upon the theory that the authors did not write under oath, and that their grounds of belief and processes of reasoning cannot be tested by cross-examination. But while the books are not admissible, an expert witness is not confined wholly to his personal experience in the treatment of men, but his opinions formed in part from the reading of treatises prepared by persons of acknowledged ability may be given in evidence. So, also, may a witness refresh his recollection by reference to
273 standard authorities; but the judgment or opinion which he gives must be his own, and not merely that of the author. In an early case it was proposed to show what the received opinion of the medical profession was in a certain matter by introducing medical books. The ruling was that they were not admissible, but that the witness might state what he had found laid down in the books in the course of his reading. The witness, who was Sir

Henry Halford, president of a college of physicians, stated that he considered the medicine in question proper, and that it was sanctioned by the books and authorities; and also stated that the writings of certain authors were considered authority by the medical profession. It was then objected that the medical books could not be cited, but the authors themselves should be called. Chief Justice TINDALL responded: "I do not think the books themselves can be read, but I do not see any objection to your asking Sir Henry Halford his judgment, and the ground of it, which may be in some degree founded upon books, as a part of his general knowledge." *Collier* vs. *Simpson*, 5 Car. & P. 73. The present case falls within this authority. Dr. Campbell is shown to be a man of large experience and extended reading in his profession, who had given his own opinion; and it was not improper for him to state that the opinion was formed from the study of books and men, and also that all the writers and authorities on the subject, so far as he knew, supported him in that opinion. *Carter* vs. *State*, 2 Ind. 617; Lawson, Exp. Ev. 176; Rodg. Exp. Ev. Test. 234; Whart. Crim. Ev. § 538.

12. The defendant's counsel prepared and requested the giving of a series of instructions, which the court declined to give, and the refusal of these constitutes sixteen of the alleged errors, although a few of the instructions requested were incomplete and inaccurate statements of the law. In the main, the requests were correct and applicable; but the court, instead of adopting the phraseology and order of those requested, as seems to be the custom, prepared an elaborate charge, in language of its own choosing. The charge given was clear and symmetrical, and embraced the law of all proper requests made by the defendant, in language, to say the least, equally as apt and accurate as that employed in the instructions requested; and, indeed, it seems to us that the court advised the jury upon and illustrated every element of the law applicable to the case. It would be unprofitable to extend this opinion so far as to point out in detail where each proper request is included in the charge given, as the difference is one of words merely, and those not included are so obviously improper as to require no special notice.

13. We will notice some of the objections urged against the instructions that were given. In the nineteenth instruction the court stated that, "before the defendant can be convicted of murder in the first degree, under the first count of the information, the following facts must be established by the evidence beyond a reasonable doubt: (1) That said Mary Baldwin came to her death by an anæsthetic called 'chloroform;' (2) that chloroform is a poison; (3) that said poison was administered to said Mary Baldwin by the defendant in the County of Atchison and State of Kansas; (4) that said poison was administered by the defendant willfully, knowingly, and with the intention of taking the life of said Mary Baldwin, on or about the eighth day of July, 1885; (5) that said Mary Baldwin

actually died from the effects of the chloroform so administered to her. If, however, you find that chloroform is poison, and that its administration to the said Mary Baldwin produced *asphyxia* resulting in death, this would be a death from poison, within the meaning of the law. If you find the existence and concurrence of each and all of the five foregoing propositions beyond a reasonable doubt, then it is your duty to find the defendant guilty of murder in the first degree, as charged in the first count of the information herein; but if you have a reasonable doubt of the existence of any one of said five propositions, then it will not be your duty to find the defendant guilty of murder in the first degree under said first count."

274 To this instruction two objections are made, the first of which is that the elements of malice and premeditation were omitted, and not held to be essential to a conviction. It will be observed that the court told the jury that it must be shown that the defendant purposely took the life of the deceased by administering poison to her. The act described, and, in fact, any murder committed by means of poison, as well as by lying in wait, involves and presupposes the elements of malice, premeditation, and deliberation; and hence it was needless for the court to state that they were prerequisites to a conviction. One of the five general facts stated by the court to be necessary, in order to establish the guilt of the defendant, was that chloroform is poison; and because the court, in stating the third and fourth prerequisites to a conviction, used the words "said poison," it is argued that it assumed it to be a fact that chloroform is a poison; and this is the other objection to the instruction. It may well be doubted whether it would be error to assume the existence of a fact of such universal knowledge as that chloroform is a poison; but, however that may be, it is clear that the instruction will not admit of that interpretation. The jury were told that this fact was essential, and one of the first to be found; and having found chloroform to be a poison, then they were, in effect, told that it must appear that said poison so found was administered by the defendant at the time and place charged, and with the intention of taking the life of his sister. Then, in the concluding sentences of the instruction, the jury were reminded again that this was one of the essential facts to be found, and that the existence and concurrence of each and all of the five propositions must be found by them beyond a reasonable doubt before they could convict.

14. The twentieth instruction is the subject of considerable criticism. Its language is: "It may be necessary to explain to you, to a certain extent, some of the terms used in the information, and others of a kindred nature. An 'anæsthetic' is defined by Webster in his dictionary as 'that which produces insensibility to pain.' 'Chloroform' is defined by him as 'an oily liquid, of an aromatic ethereal odor, consisting of carbon, hydrogen, and chlorine. It evaporates speedily, and has a specific gravity of 1.5. It is an

important anæsthetic agent, and is also used externally, to alleviate pain. It is also a powerful solvent, dissolving easily wax, spermaceti, resins," etc. '*Asphyxia*' is defined by the same authority as, 'originally a want of pulse, or cessation of the motion of the heart and arteries,' as now used, apparent death or suspended animation, particularly from suffocation or drowning, or the inhalation of irrespirable gases. Recently applied, also, to the collapsed state in cholera, with want of pulse.' 'Poison' is also defined by Webster as 'any substance which, when introduced into the animal organization, is capable of producing morbid, noxious, or deadly effect upon it.' In some of the editions of his work he makes the following comments: 'All medicines possessing sufficient activity to be of much value are always poisonous in inordinate or excessive quantities, and everything poisonous is capable of proving medicinal in suitably reduced quantities. There are as many different modes in which poisons operate as there are different and distinct medicinal powers of any material activity.' In the American Cyclopedia poison is defined as 'any substance which, introduced in small quantities in the animal economy, seriously disturbs or destroys the vital functions. Under this head are obviously included a vast number of bodies belonging to the mineral, vegetable, and animal kingdoms, some solid, others fluid, and others gaseous, and deleterious vapors and miasmata, imperceptible to the senses;' and in the same article the same authority also stated that, 'among the multitude of substances that rank as poisons, are many, some possessing the most active qualities, which are also useful drugs, and which, administered in suitable quantities, are recognized among medicines in universal employment, and of the most beneficial character. The difference between a medicine and a poison is frequently a mere question of dose, and the line which divides them is sometimes narrow.' As the question is raised by the evidence in this case whether chloroform is a poison or not, the court also deems it proper to state that it is a powerful anæsthetic agent, having been discovered so recently as 1831, and, not having come into use by the medical profession until 1847, there may be some room for a difference of opinion as to its powers, properties, and effects. In common parlance, however, 'chloroform' is classed among the poisons; and, by the pharmacy act passed by the Legislature of this State in 1885, it is expressly named as one of the things which it is unlawful for any person to sell, (except to physicians, photographers, or upon prescription,) without being labeled as a 'poison.' The lawful and general use of chloroform is for the purpose of producing insensibility to pain during surgical operations, and other painful processes; and in such cases it is generally administered by physicians and surgeons, and their assistants."

In regard to the foregoing instruction, it is stated that the court in quoting the definitions given in the books, transgressed the rule which forbids the introduction in evidence of books of authority, or

of any citation therefrom. It is the duty of the court to advise the jury what questions are submitted for their consideration, and the rules of law applicable in determining the same; and it may also review the facts of the case, provided the jury are informed that they are the exclusive judges of the facts. Crim. Code, § 236. In charging the law it falls within the province and duty of the court to determine the sufficiency of the indictment or information, and to define and make plain the words used in charging the offense. By section 107 of the Criminal Code it is provided "that the words used in the indictment or information must be construed in their usual acceptation and common language, except words and phrases defined by law, which are to be construed according to their legal meaning." Testimony is necessary where the words have a local meaning different from their ordinary acceptation, or where they have acquired a peculiar meaning in some science, art, or trade. But the court takes notice of the meaning and force of the ordinary words of our language, and also of technical words, where the meaning is well settled by common usage, and may, where it is necessary, define and explain them to the jury. The Supreme Court of Massachusetts held that "the general rule of law is that the construction of every written instrument is matter of law, and, as a necessary consequence, that courts must, in the first instance, judge of the legal force and effect of the language. The meaning of words, and the grammatical construction of the English language, so far as they are established by the rules and usages of language, are *prima facie* matter of law, to be construed and passed upon by the court." *Brown* vs. *Brown*, 8 Metc. 573. See, also, 1 Greenl. Ev. § 5; Thomp. Char. Jur. § 18; Rog. Exp. Test. § 121; *Rodgers* vs. *Kline*, 56 Miss. 818; *Haley* vs. *State*, 63 Ala, 89; *Gibson* vs. *Cincinnati Enquirer*, 5 Cent. Law J. 380.

The words "anæsthetic," "chloroform," and "poison" were used in the information and by the court in other parts of its charge. They are words in common use in the vernacular of the language, and have a well settled meaning which is not local, and cannot be regarded as technical or peculiar. It was therefore proper for the court to aid and enlighten the jury by defining the words, and giving their usual meaning and acceptation in common language. It is true the court quoted the definitions given in Webster's Dictionary and American Cyclopedia, but there is no claim that the definitions were incorrect in any respect; and what cause, then, is there for complaint? By incorporating the definitions and comments of those authorities in the instructions, the court approved them, and made the language employed in them his own: and, as the definitions were in no way faulty, the defendant has no reason to complain that the language employed by the court had formerly been used by others. It may be stated that what was said regarding these words, as well as of "*asphyxia*," is not at all at variance
276 with the testimony; and if the words defined were all treated as technical terms in science, and what was said of them as

facts, still the court, as we have seen, had a right to sum up and present the facts of the case, so long as the jury were told that they were the exclusive judges of all the questions of fact; and this was done. Neither do we think there was error in the statement of the court that, in common parlance, chloroform is classed as a poison. There may be some difference of opinion respecting some of its properties and effects; but it seems to us that it is regarded by the masses of the people as a poison. In addition to the fact that it is so classed in the books, the Legislature of the State has published it as a poison, and required that it shall not be sold except upon prescription, or to physicians or photographers, unless the vessel in which it is contained, as well as the outside wrapper, shall be distinctly labeled "Poison;" nor unless, upon due inquiry, it is found that the purchaser is aware of its poisonous character. Section 12, *c.* 150, Laws 1885. This law, which all are presumed to know, places the same restriction upon the sale of chloroform as is done in the case of arsenic, corrosive sublimate, and strychnia; and classes it with aconite, belladonna, digitalis, oxalic acid, "and other virulent poisons." In view of these facts, it cannot be well claimed that the court erred in telling the jury that, in common parlance, chloroform was classed among the poisons. The court, however, did not take from the jury the question as to whether it was a poison; but, when the instructions are read together, it will appear that what is complained of is beneficial, rather than otherwise, to the defendant. It was only saying that, although chloroform is generally regarded by the masses of the people as a poison, yet they must not take that for granted, but, before the jury could convict, they must, from the evidence, find it to be a poison beyond a reasonable doubt.

15. The court instructed the jury upon the law of descents and distributions, stating fully what would be the rights of the defendant, under the law, upon the death of his father, the direct and remote effect of his sister's marriage, and his rights as heir of his mother, if he should survive her. In closing the instruction the court stated: "Whether the defendant had knowledge of all these rules of descents and distributions does not clearly appear; and, if he committed the crime charged against him, he may or may not have been mistaken as to the direct or the remote probabilities of gain from his sister's death, and his motive should be judged from his supposition as to the law of descents and distributions, rather than from the accuracy of his views upon that subject." It is urged that by the giving of this instruction the jury were sent into the field of conjecture and speculation, to find a motive of the defendant for the commission of the offense. It should be remembered that the father of the defendant had died leaving a large estate, and his only heirs were the widow, the deceased, and the defendant. The deceased was about to be married, and the mother was well advanced in years and an invalid. The defendant had spent a large part of the money he had received from the estate,

and was in great need of money. Upon the inquiry of the defendant, the Probate Judge testified that he explained to the defendant the law of descents and distributions, but just what he said the law was, is not shown. The defendant asked the court to instruct the jury regarding motive, and upon the law of descents and distributions, and this request, together with the circumstances of the case, certainly justified an instruction upon that subject. Nor was there error in the last part of the instruction, where the jury were, in effect, told, with respect to motive, that the defendant should be judged by the information upon which he acted, rather than upon the accuracy of his information.

16. It is next contended that the verdict is contrary to the evidence. In respect to the evidence, we need only to quote from the able opinion given by the trial judge in overruling the motion for a new trial: "Was the jury justified in finding the defendant guilty upon the evidence adduced? The theory of suicide was
277 extremely improbable, and the jury were perhaps fully justified, upon the evidence, in believing that the entering of the dwelling was not for the purpose of rape, robbery, or larceny. With these motives and theories eliminated, the jury was almost driven to one of two conclusions: Either that Mary Baldwin was murdered by an enemy for the purpose of revenge, or by some person who hoped to gain by her death. In this view the range of probabilities as to her murderer is narrow and circumscribed. The circumstances do not point towards any person other than the defendant. Do they point to him with sufficient precision to justify the jury in saying he is guilty beyond a reasonable doubt? It is reasonably certain that Mary Baldwin died from the effects of chloroform which had been purchased of Benjamin F. Binswanger at Brokaw's pharmacy, in St. Joseph, Missouri, at some time after January 12, 1885. The defendant told Lewis H. Haynes, in April, May, or June, 1885, that he was going to St. Joseph. Mr. Binswanger was not asked in the court if he recognized the defendant as the person who purchased the chloroform, but only stated, when the photograph (admitted to be that of the defendant) was shown him at St. Joseph, that it made an impression that he had seen the same face before. There is no testimony that any person saw the defendant near his mother's house on the night of July 7 or the morning of July 8, 1885; but he resided only three or four blocks away, and he admitted to two persons that he was out that night, and to one of them that his wife was crying when he returned. Some marks in and about the panel seem to have been made by a knife having a blade like the one in the pocket knife which the defendant carried. The door was probably open when the panel was cut. This is indicated by the small cuttings which Mrs. Farres took from the sawdust lying about eighteen inches inside of the door. This fact, together with some others, probably justified the jury in believing that the murderer resorted to a ruse to create the false impression that the house had been entered by a burglar for

the purpose of robbery or larceny. These are substantially all of the circumstances tending to connect the defendant with the crime. A motive on the part of the defendant for the commission of the crime was perhaps sufficiently shown, if it be admitted that a man could be base enough to murder his own and only sister, for the direct or remote prospect of adding a few thousand dollars to his fortune. Much of the testimony related to his conduct and manner after the tragedy, and the jury perhaps believed that his actions illy comported with his innocence, and the cause of his sister's untimely death. It must be admitted that the evidence of the defendant's guilt is not entirely conclusive, but it is of such a nature that honest and intelligent men might differ in opinion as to its sufficiency to justify a verdict of guilty." 2 Kan. Law J. 326. Although the testimony written in the record is not so full and satisfactory as we would wish, after a careful reading, we are constrained to the opinion of the trial judge that it was sufficient to uphold the verdict.

17. The effort of the defendant to show that the jury were influenced by the alleged prejudice and conduct of the people who attended the trial is a failure; and the same may be said of his attempt to show that some of the jurors were disqualified, and had expressed opinions prior to the trial that the defendant was guilty of murdering his sister. Upon this question the testimony was oral and conflicting, and, in such a case, the finding of the trial judge, like the verdict of the jury, is conclusive upon the court. *State* vs. *Bohan*, 19 Kan. 56; *State* vs. *Tatlow*, 34 Kan. 80; S. C. 8 Pac. Rep. 267.

In concluding this opinion, we will say that the gravity of the offense, the peculiar circumstances surrounding the case, and the great earnestness and ability with which counsel for defendant has pressed his points upon the court, have led us to examine the record with great care. The testimony given, as well as every point made and authority cited, have been considered with that anxious attention which the consequences of a conviction demand;
278 but we are forced to the conclusion that the case has been well and fairly tried, that the errors committed are technical and unimportant, and not such as would justify a reversal of the conviction. We will therefore affirm the judgment of the District Court.

(All the justices concurring.)

278½ And on the 9th day of December, 1886, there was issued from this court a mandate to the District Court of Atchison County Kansas, in words and figures as follows, to-wit:

SUPREME COURT }
STATE OF KANSAS. } ss.

The State of Kansas to the District Court within and for the County of Atchison in the State of Kansas. Greeting:

WHEREAS, In a certain criminal action lately pending before you, wherein the State of Kansas was plaintiff, and William Baldwin was defendant, a judgment was rendered by you against the said defendant on a transcript of which judgment and record said defendant prosecuted an appeal in the Supreme Court within and for the State of Kansas.

AND, WHEREAS, At the December session of the July term of said Supreme Court A. D. 1886, on consideration of said appeal it was ordered and adjudged by the said Supreme Court, that the judgment of the District Court be affirmed with costs.

You are therefore commanded, that without delay you cause execution to be had of the said judgment of the Supreme Court according to law.

Witness my hand and the seal of said Supreme Court affixed hereto, at my office, in the city of Topeka, on the 9th day of December A. D. 1886.

C. J. BROWN,
Clerk of the Supreme Court.

Seal of the Supreme Court State of Kansas.

To the issuing of which said mandate the defendants duly excepted.

279 And on the 14th day of December, 1886, the defendant filed his motion for a rehearing in this case in words and figures as follows, to-wit:

In the Supreme Court of the State of Kansas.

THE STATE OF KANSAS
vs.
WILLIAM BALDWIN.

MOTION OF RE HEARING.

Now comes the appellant, William Baldwin, and moves the court for a re-hearing herein, and a reconsideration of the errors heretofore presented for a reversal of the judgment of the court below for the following reasons, to wit:

First. Because on the first assignment of error, as heretofore presented by appellant, this court in the opinion filed herein mistakes the record, and erroneously states in said opinion that the form of the oath administered to the jury does not appear in the bill of exceptions filed herein, and that it only appears in the journal entry made by the clerk of the court below.

A. Because this court seems to base its opinion upon said point largely upon the fact, as stated, that the decision of the Supreme Court of Alabama, in the case of Johnson vs State, 47 Ala., 62, which sustained the position taken by appellant as to said oath, was expressly overruled by the same court in Mitchell vs. State, 58 Ala., 417, and the doctrine of 47 Ala. denied. Whereas in truth and in fact the rule as laid down in 47 Ala. 62 has been repeatedly

re-affirmed and announced by that same court, in Lewis vs. State, 51 Ala., 5; Smith vs. State, 53 Ala., 486; Davis vs. State, 54 Ala., 88; Com. vs. State, 60 Ala., 6; Perkins vs. State, 60 Ala., 7; Schamberger vs. State, 68 Ala., 543; Allen vs. State, 71 Ala., 6; Storey vs. State, 71 Ala., 330; Johnson vs. State, 74 Ala., 537; Carey vs. State, 76 Ala., 78. In which last cited case the oath as administered, as shown by the record, was identical in
280 form with oath as shown by the record in this case; and this court in its opinion seems to ignore entirely the fact, that the same identical question present here has been decided by the following Supreme Courts of this country, viz.: Arkansas, Colorado, Iowa, Minnesota, New Hampshire, Nevada, Texas.

B. Because the court in its opinion lays down the erroneous proposition, that where the record affirmatively shows a fatal defect, that the prisoner waves it by not objecting thereto; whereas in law the failure to properly swear the jury is jurisdictional, and without such oath it is not a jury in contemplation of law, and not a legally constituted tribunal.

Second. Because this court in subdivision two of the opinion erroneously and without any precedent to sustain it, and in violation of fundamental and well settled principles of law, lays down the rule of law to be, that transactions between Mrs. M. A. Baldwin and A. H. Lewis, in the absence of the defendant, and of which he had no knowledge, were competent to go to the jury.

Third. Because the court, by ignoring assignment of error No. 7, has laid down the rule to be that statements of the deceased several weeks before her death, made of and concerning the defendant to the witness, not in the presence of the defendant, were competent to go to the jury, even though of a prejudicial nature, thus establishing the rule that hearsay evidence is competent in a case of so much gravity as the one at bar.

A. Because the court in its opinion, in subdivision two, holds that certain testimony of Lewis was competent because of the "conduct of the appellant in frequently applying for money from his mother through Lewis," when in truth and in fact there
281 is no intimation in the record that appellant ever applied to his mother for money through this man Lewis, and there is nothing in the record from which any such inference could be drawn.

Fourth. Because the court has erroneously stated the law in subdivision three of said opinion, for the reason that while such evidence may be received, it is never competent until the witness first states in detail the facts from which he draws the inference or opinion.

A. The same may be said of the opinion of this court as to the testimony of Frank Price. This court has there laid down the rule to be that an ordinary witness can give his opinion as to the appearance of a party without first stating the facts; and erroneously announced the rule to be, that an ordinary witness can give

an opinion upon the condition of one's mind, and this in violation of former decisions of this court, and nearly, if not all, elementary writers upon the same subject.

Fifth. Because this court has erroneously decided, that it is competent to prove the general demeanor and conduct of a party charged with crime, after the alleged crime was committed, and before he has attempted to put his character and conduct in issue; and in announcing such doctrine denies the applicability of the decisions of this and other courts holding that such testimony is incompetent, by assuming that *the purpose* of such testimony was not made with a view to initiate an inquiry into defendant's character, or to show that he had committed other offense; whereas in truth and in fact such *purpose* does not appear from the record in this case, but the only *apparent* purpose being to blacken defendant's character and prejudice him before an already prejudiced jury.

282 *A.* Because this court, being constrained to hold that the inquiry in this case was too general, and extended over too long a period, and being unresponsive and irrelevant should been sticken out, and then proceeds to hold and announces the doctrine, that although incompetent, this court *thinks* it did *not* work any prejudice to the defendant because this same testimony *did* show that defendant, while in jail, did not manifest evidence of grief at the loss of his sister. This ruling being in violation of repeated rulings of this court and other courts, that the question for an appellate court is not whether incompetent evidence *did*, but whether it *might* or *may have* prejudiced the defendant.

Sixth. Because this court, in violation of repeated decisions of this and other courts, lays down the rule in subdivision five of the opinion, that an expert witness may give his opinion to the jury, notwithstanding the fact that such opinion was not necessary to aid the jury to arrive at the facts of the case; and announced the rule to be that because the evidence offered to sustain the conviction was circumstantial, that therefore the testimony of experts was more than ordinarily important; whereas the rule of law is, that in no case is the testimony of experts competent, when the jury can get along without it, and the opinion of this court in this case is in direct conflict with prior decisions of this court, wherein it has been repeatedly held that the "opinion of a witness is inadmissable on questions which can be decided by the jury on the facts."

Seventh. Because the court in subdivision 6 of its opinion, while admitting it was error to receive in evidence said check, erroneously holds that such error was without prejudice, when by an examination of the record it will appear, that such check before the jury laid the foundation for the claim and inference that

283 the check was in response to the letters of defendant to his mother, and that the mother by sending the check to the daughter, instead of to the defendant, exhibited a lack of confidence

in defendant, and there is no foundation in the record for the claim of this court, that the conceded error was a harmless one, or is such an error as is contemplated by Sec. 293, Crim. Code.

Eighth. Because the court has placed a wrong construction upon the testimony of Clergyman Mulford, referred to in subdivision eight of opinion, and erroneously holds and announces the doctrine to be, that such cross-examination was competent, as it afforded a foundation for impeaching the witness; whereas it was an inquiry as to the opinion of the witness, and was an attempt to get before the jury incompetent and improper testimony; and was not, as stated by the court, justified by the examination in chief.

Ninth. Because the court erred in holding that the testimony of John M. Crowell was competent, and in subdivision ten of the opinion, while attempting to answer the objections to such testimony, does not correctly state the record; and there is no attempt made by this court to meet the objection made to the testimony of this witness on page 239–240 of record, and referred to on pages 71 and 72 and 73 of brief, and the court in so far as it passed on said question, in effect holds that it was proper to show that great experience of the witness as a detective, before showing the appearance of the defendant by the witness, thereby holding that his testimony was of more value than that of a person who had no experience in such business; because the fact that the court below admitted the evidence was sufficient for the jury to infer that it was important.

Tenth. Because this court, in subdivision eleven of the opinion, in effect holds that hearsay evidence is competent, and in making such ruling, incorrectly states the record and the testimony
284 of the witness, and the authorities cited by this court do not sustain the position taken in the opinion herein, and such opinion is in violation of the great weight of authority in this country.

Eleventh. Because this court, in subdivision twelve of this opinion, incorrectly states, that the instructions asked by defendant were in substance given by the court below in its general charge to the jury.

A. Instruction No. 9 (brief page 80), was refused. The subject matter of the instruction was not referred to in the general charge of the court, yet this court states in said opinion that the court below "advised the jury upon and illustrated every element of the law applicable to the case."

B. The court refused to give instructions copied in page 63 of brief; the subject matter of these instructions was not referred to in the general charge of the court; they state the law, and were applicable and necessary.

C. Because this court erroneously holds that it is not necessary to instruct, and not error to refuse to instruct a jury in a case made out by circumstantial evidence; that the evidence must be so conclusive as to show that the defendant, and no other person, com-

an opinion upon the condition of one's mind, and this in violation of former decisions of this court, and nearly, if not all, elementary writers upon the same subject.

Fifth. Because this court has erroneously decided, that it is competent to prove the general demeanor and conduct of a party charged with crime, after the alleged crime was committed, and before he has attempted to put his character and conduct in issue; and in announcing such doctrine denies the applicability of the decisions of this and other courts holding that such testimony is incompetent, by assuming that *the purpose* of such testimony was not made with a view to initiate an inquiry into defendant's character, or to show that he had committed other offense; whereas in truth and in fact such *purpose* does not appear from the record in this case, but the only *apparent* purpose being to blacken defendant's character and prejudice him before an already prejudiced jury.

282 *A.* Because this court, being constrained to hold that the inquiry in this case was too general, and extended over too long a period, and being unresponsive and irrelevant should been sticken out, and then proceeds to hold and announces the doctrine, that although incompetent, this court *thinks* it did *not* work any prejudice to the defendant because this same testimony *did* show that defendant, while in jail, did not manifest evidence of grief at the loss of his sister. This ruling being in violation of repeated rulings of this court and other courts, that the question for an appellate court is not whether incompetent evidence *did*, but whether it *might* or *may have* prejudiced the defendant.

Sixth. Because this court, in violation of repeated decisions of this and other courts, lays down the rule in subdivision five of the opinion, that an expert witness may give his opinion to the jury, notwithstanding the fact that such opinion was not necessary to aid the jury to arrive at the facts of the case; and announced the rule to be that because the evidence offered to sustain the conviction was circumstantial, that therefore the testimony of experts was more than ordinarily important; whereas the rule of law is, that in no case is the testimony of experts competent, when the jury can get along without it, and the opinion of this court in this case is in direct conflict with prior decisions of this court, wherein it has been repeatedly held that the "opinion of a witness is inadmissable on questions which can be decided by the jury on the facts."

Seventh. Because the court in subdivision 6 of its opinion, while admitting it was error to receive in evidence said check, erroneously holds that such error was without prejudice, when by an examination of the record it will appear, that such check before the jury laid the foundation for the claim and inference that

283 the check was in response to the letters of defendant to his mother, and that the mother by sending the check to the daughter, instead of to the defendant, exhibited a lack of confidence

in defendant, and there is no foundation in the record for the claim of this court, that the conceded error was a harmless one, or is such an error as is contemplated by Sec. 293, Crim. Code.

Eighth. Because the court has placed a wrong construction upon the testimony of Clergyman Mulford, referred to in subdivision eight of opinion, and erroneously holds and announces the doctrine to be, that such cross-examination was competent, as it afforded a foundation for impeaching the witness; whereas it was an inquiry as to the opinion of the witness, and was an attempt to get before the jury incompetent and improper testimony; and was not, as stated by the court, justified by the examination in chief.

Ninth. Because the court erred in holding that the testimony of John M. Crowell was competent, and in subdivision ten of the opinion, while attempting to answer the objections to such testimony, does not correctly state the record; and there is no attempt made by this court to meet the objection made to the testimony of this witness on page 239–240 of record, and referred to on pages 71 and 72 and 73 of brief, and the court in so far as it passed on said question, in effect holds that it was proper to show that great experience of the witness as a detective, before showing the appearance of the defendant by the witness, thereby holding that his testimony was of more value than that of a person who had no experience in such business; because the fact that the court below admitted the evidence was sufficient for the jury to infer that it was important.

Tenth. Because this court, in subdivision eleven of the opinion, in effect holds that hearsay evidence is competent, and in making such ruling, incorrectly states the record and the testimony
284 of the witness, and the authorities cited by this court do not sustain the position taken in the opinion herein, and such opinion is in violation of the great weight of authority in this country.

Eleventh. Because this court, in subdivision twelve of this opinion, incorrectly states, that the instructions asked by defendant were in substance given by the court below in its general charge to the jury.

A. Instruction No. 9 (brief page 80), was refused. The subject matter of the instruction was not referred to in the general charge of the court, yet this court states in said opinion that the court below "advised the jury upon and illustrated every element of the law applicable to the case."

B. The court refused to give instructions copied in page 63 of brief; the subject matter of these instructions was not referred to in the general charge of the court; they state the law, and were applicable and necessary.

C. Because this court erroneously holds that it is not necessary to instruct, and not error to refuse to instruct a jury in a case made out by circumstantial evidence; that the evidence must be so conclusive as to show that the defendant, and no other person, com-

mitted the crime; such instruction was asked, refused, and not referred to in general charge of the court.

D. Because this court holds in this case that it is not error to refuse to instruct the jury that defendant may withhold all evidence, until the prosecution has made out a perfect and complete case against him, although the reverse of such doctrine has been repeatedly held by this court in prior decisions.

E. Because this court erroneously holds that the instructions asked by defendant were properly refused.

Twelfth. Because this court has announced the erroneous doctrine, that the trial court may go outside of the evidence and the record, and read to the jury extracts from books, otherwise improper to go to the jury, and thus sanctioned a rule of practice, unsustained by any known precedent or authority.

Thirteenth. Because this court, in substantially adopting the opinion of the court below in subdivision fifteen of opinion in this court, seems to have overlooked the point made by appellant on said instruction twenty-three, and to have in no manner considered the special objection made and urged to said instruction, in this, that instruction suggest a motive for the commission of the crime, and makes, to say the least, an intimation not authorized by the evidence: and this court in said subdivision mistake the record in saying that "the defendant had spent a large part of the money he had received from the estate, and was in great need of money." Again, the defendant did not, as stated by this court, ask any instruction that would justify the court below in violating every principal of law, and common fairness by suggesting a motive not authorized by the evidence.

Fourteenth. Because this court erroneously announces the rule of law to be that in cases of circumstantial evidence, even if the evidence is not conclusive of the defendant's guilt, if it is of such a nature that honest and intelligent men might differ in opinion as to its sufficiency, a verdict of guilt will not be disturbed, which doctrine has but one precedent, and that the decision of the learned judge in the court below, and which is in violation of repeated decisions of this court.

Fifteenth. Because this court has erroneously sustained the conviction of the defendant against the law of the land, and in face of the fact that the record does not disclose any evidence of his guilt.

EVEREST & WAGGENER,
Attorneys for Appellant.

287 And on the 16th day of December, 1886, the defendant filed his amendment to said motion for a re-hearing in words and figures as follows to-wit:

In the Supreme Court of the State of Kansas.

THE STATE OF KANSAS, *Appellee*,
vs.
WILLIAM BALDWIN, *Appellant*.

Amendment to Motion for Re-hearing.

Appellant here amends his motion for a re hearing by adding the following to the first ground or reason for such re-hearing as assigned and set forth in the motion now on file, viz. :

C. Because that in and by the Fourteenth Amendment to the Constitution of the United States of America, it is provided that, "No State shall deprive any person of life, liberty, or property without due process of law." And by the decision of this court filed herein it is decided and held, that although the jury by and before which the defendant was tried, was not "sworn a true verdict to render according to the law and the evidence," as required by the statute of this State and by law, nevertheless the verdict of said jury must stand, as also the sentence of death thereon, because the defendant did not object to such illegally constituted jury and tribunal.

D. Because this court has decided that it is due process of law to deprive a person of his life and liberty by and through the instrumentality of an illegally constituted tribunal, for the reason and only because the defendant did not interpose objection thereto, which decision is in conflict with and in contravention of said Fourteenth Amendment to the Constitution of the United States of America.

EVEREST & WAGGENER,
Attorneys for Appellant.

Filed December 16, 1886.

C. J. BROWN, Clerk Supreme Court.

288 And thereupon and thereafter and on the 2nd day of March, 1887, the said motion for re-hearing came on for argument, and after argument thereon on the 9th day of July, 1887, the court made its order overruling said motion in words and figures as follows, to-wit :

THE STATE OF KANSAS, *Appellee*,
vs.
WILLIAM BALDWIN, *Appellant*.

Now comes on for decision, the motion for a re-hearing of this cause heretofore submitted herein; and thereupon after consideration of all the matters presented by said motion : It is ordered that the said motion be overruled and denied, and the court expressly finds, that in empaneling and swearing the jury as appears from the record presented, neither the fifth nor the fourteenth amendments to the Constitution of the United States were in any way violated or infringed, and that neither of said amendments were violated or infringed by any proceedings in the case.

To the overruling of which said motion the defendant duly excepted. And to the finding of the court that in empaneling and swearing the jury, as appears from the record presented, neither the fifth nor the fourteenth amendments to the Constitution of the United States were in any way violated or infringed, and that neither of said amendments were violated or infringed by any proceedings in the case; the defendant then and there duly excepted.

289 And now, on this 10th day of September, 1887, came the defendant and presented this bill of exceptions in open court, to the judges thereof, and asked that the same be settled, allowed and certified as a bill of exceptions in this case, to be taken to the Supreme Court of the United States. And the same having been examined and found to be correct, is, by the Court, settled and allowed, and made a part of the record in this case, to be sent to the Supreme Court of the United States for the purpose of reviewing the judgment herein.

ALBERT H. HORTON,
Chief Justice of the Supreme Court of the State of Kansas.

In the Supreme Court of the State of Kansas.

I, C. J. Brown, Clerk of the Supreme Court of the State of Kansas, do hereby certify that the foregoing is the original bill of exceptions allowed by the Supreme Court of the State of Kansas in the foregoing entitled action.

Witness my hand and the seal of the Supreme Court, affixed thereto at my office in Topeka, this 10th day of September, 1887.

[SEAL] C. J. BROWN,
Clerk of the Supreme Court of the State of Kansas.